STATE OF WISCONSIN

SUPREME COURT

APPELLANT'S BRIEF and APPENDIX

Donald R. Kitten,
Plaintiff-Appellant-Petitioner,

v.

Case No. 00-3562
Circuit Court Case 00-CV-559

State of Wisconsin
Department of Workforce Development
Defendant-Respondent-~~Respondent~~

APPEAL FROM THE DECISION OF
THE COURT OF APPEALS
FOR THE
STATE OF WISCONSIN - DISTRICT 2
Dated: August 8, 2001

Recommended for publication and order published by order of September 26, 2001

Waukesha County
Judge Donald J. Hassin

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STATEMENT OF ISSUES

The Statement of Issues presented for review:

I. May a Complainant in a Housing Disability Discrimination Case be determined to have been discriminated against by a prospective landlord without proving that he has a disability, which would qualify as such under the Wisconsin Open Housing Act or other legislation.

II. May a prospective landlord be found guilty of a perceived discrimination if the only perception which the landlord could have had relative to disability would be the perception of an impairment, which does not limit a life activity as defined by law.

III. May a landlord exact different terms from a prospective tenant based upon economic criteria.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Appellant feels there is no need for oral argument in this case anticipating that the briefs will fully present the issues and facts on appeal. The Appellant believes that the decision should be published for the following reasons:

A. Publication of the decision will help clarify the law relative to the application of the Americans with Disabilities Act and the Wisconsin Statutes adopted regarding disability discrimination, especially in the light of recent Federal Court decisions, which supercede in time Wisconsin Court decisions; and

B. There is a lack of case law relative to housing discrimination cases with most reported opinions dealing with employment discrimination. Publication

of this decision will clarify the laws of discrimination as it relates to disability in the State of Wisconsin.

STATEMENT OF CASE

A. Nature of the Case.

This is case is based upon alleged discrimination in the rental of housing, alleging a violation of the Wisconsin Open Housing Act, Section 106.04(1)(8) of the Wisconsin Statutes. One, Spencer Cenamme caused to be filed a Discrimination Complaint with the Wisconsin Department of Workforce Development, alleging that the Appellant, Donald Kitten, unlawfully discriminated against the Complaint by exacting or attempting to exact a different or more stringent price, term, or condition for the rental of a housing unit, because of a disability within the meaning of the Wisconsin Open Housing Act. The Appellant was found guilty of discrimination by a hearing examiner or, as hereinafter referred to in this brief, an Administrative Law Judge, acting on behalf of the Department of Workforce Development and ordered to pay damages to the Complainant.

B. Procedural History of the Case.

The case was commenced by the filing, by the Complainant, Spencer Cenamme, of a Housing Discrimination Complaint with the Wisconsin Department of Workforce Development. The Department issued a finding of probable cause, which was contested by the Appellant, and the matter went

through a full-day hearing before an Administrative Law Judge, who found in favor of the Complainant. The Appellant, Donald R. Kitten, appealed the decision of the Administrative Law Judge to the Circuit Court for Waukesha County, the Honorable Donald J. Hassin, Jr., Circuit Court Judge presiding. The Circuit Court Judge affirmed the decision of the Administrative Law Judge and the Appellant appealed the Trial Court's Decision and, in effect, the Decision of the Administrative Law Judge to the Court of Appeals for District 2, and in a Decision ordered published, and dated August 8, 2001, affirmed the Decision of the Trial Court and, in effect, the Decision of the Administrative Law Judge. A copy of the Court of Appeals Decision is appended hereto as Appellant's Appendix 121-138. Appellant caused to be flied with the Supreme Court a Petition for Review, which Petition was dated August 30, 2001, and the Petition was granted by Order of the Supreme Court, dated October 23, 2001, which Order ordered, among other things, that the Appellant file a brief with the Supreme Court within thirty (30) days of October 23, 2001.

C. Statement of Facts.

The Appellant, Donald R. Kitten, is a licensed real estate broker in the State of Wisconsin, and has been engaged in a real estate practice for approximately 25 years (T.163). At one period of time, he had managed up to 1,000 rental units on behalf of himself and clients and, at the time of hearing in this action, was managing his own rental properties of approximately 164 units. During the period of time the Appellant was engaged in the residential rental business, it was

unrefuted that there were no prior complaints of discrimination made or filed against the Appellant (T.140, 164). On September 9, 1998, the Complainant contacted the Appellant indicating that he was interested in renting an apartment owned by the Appellant (T.9-10, 99, 165-166). The initial contact between the Complainant and the Plaintiff was initiated by response by the Complainant to an advertisement, which he had seen in the newspaper. The Complainant called the Appellant inquiring about the apartment in Brookfield, which was listed in the newspaper for rent, and testified that the general conversation was to the effect that it was a fairly expensive apartment and the appellant inquired in the initial contact between the parties as to the Complainant's employment, saying something to the effect that "you probably have a pretty good job to be able to pay that kind of rent". The response of the Complainant was to the effect that he was not working, but that he had a letter and a financial statement from his banker for financial assurance to the landlord, that the rent could be paid, and based upon that assurance, a meeting was set up between the Complainant and the Appellant (T.9). The parties met at the apartment complex and the Complainant furnished to the Appellant a letter signed by the Complainant's father, dated august 28, 1998, and addressed "To Whom It May Concern". The letter indicated that the Complainant has a current balance in a Merrill Lynch account of approximately $40,000 and $3,000 per month cash income (after tax) written on Merrill Lynch letterhead, which lists the Complainant's father as a Senior Vice-President of Investments in the upper right-hand corner (Exhibit 1). At the time of the first meeting, the

parties viewed the apartment, a rental application was filled out in the handwriting of the Appellant, but based upon information furnished by the Complainant. On the rental application, the Complainant listed no employment, listed his address as an address in the state of Ohio, indicated that he had one VISA account and listed his bank as Merrill Lynch with a savings and a checking account. The base rent for the apartment was $925.00 (Exhibit 9). When the Complainant first called the Appellant, he called from Rogers Memorial Hospital and the Appellant was aware of the origination of the call based upon his Caller I.D. (T.179). Initially, however, the Complainant told the Appellant he was staying with friends in Oconomowoc (T.18), but finally disclosed that he was residing at a residential treatment center at Rogers Memorial Hospital voluntarily disclosing that "I have serious issues....around food and body image and self-confidence, self-esteem issues and things of that nature." (T.11) The Complainant then indicated to the Plaintiff that he was under doctor's care at that time. (T.12) The discussion between the Appellant and the Complainant then ended according to the Complainant's testimony with a comment by the Complainant to the Appellant to the effect: "I am not a dishonest person, but I did just fib to you about where I was staying. I had completely disclosed where I was and I was there at Rogers Memorial Hospital and the treatment for an eating disorder and he was....he seemed fine....he said he was fine with it and then he kind of joked around "yeah, I know what you mean about overeating and he asked questions, you know, about whether it was overeating or undereating." Subsequent to that conversation, the

Appellant then went over a proposed lease form with the Complainant and the Complainant signed the lease for the apartment (Exhibit 3) The rental application was taken subject to a credit report and the Complainant acknowledged that he knew there was going to be a credit check (T.106)

After the initial meeting between the parties, the Appellant immediately ordered a credit report, which report was ordered on September 11 (T.174) The Appellant indicated that he was very zealous about checking the credit of his prospective tenants and he was concerned about the Complainant, because his general guideline would be not to rent to a party whose income did not equal 25 to 33 percent of the required rental payment. He was concerned because the Complainant had not furnished him with a previous address, had mislead him initially regarding where he was living, and the documentation he had furnished relative to financial ability came from his family members. (T.176-181) There was no further contact between the parties until the end of September, when the Complainant called the Appellant concerning the key for the apartment and to obtain a copy of the lease (T. 27, 29, 119) The Complainant testified that the Appellant then told him that he would be more comfortable with six months rent up front before the Complainant moved in, expressing concern of about what would happen if the Complainant went back into the hospital, because the Appellant goes out of town for six months a year and was worried that he would not be able to get in touch with the Complainant to collect his rent payments (T.28-29,94-95, 120-121, and 129). An agreement was reached between the

parties regarding payment of the advance six months rent and an appointment was made to meet between the parties and to grant occupancy to the Complainant of the apartment in question, the meeting being set for October 2, 1998 (T.29-31). The Appellant testified that he asked for the six months rent up front because he was concerned about the Complainant's lack of employment, lack of rental history and lack of credit history (T.185-186, 225). The Appellant also testified that there had been cases in the past when he requested additional rent from prospective tenants because of insufficient employment or income, but such cases were rare, because he rarely gets applicants who are non-workers (T.195, 209).

The Appellant and the Complainant agreed to the Appellant's request for payment of an additional six months rent (T.28-31). After that agreement, the Appellant continued to attempt to verify the information which had been given to him by the Complainant, asking the Complainant if he was suicidal, and the Complainant's response was negative. (T.43, 133) The Appellant withdrew his request to speak with the Complainant's doctor (T.44, 95-96, and 134).

During the hearing before the Administrative Law Judge, the Complainant gave certain testimony relative to the contents of the final telephone discussions between the parties and, in that regard, indicated in answer to a question from Appellant's counsel question:

Question: "Was it your understanding that had you shown up on October 1st or 2nd with six months rent in your hand, you would have had that apartment?"

Answer: "Yes."

Question: "Was it your decision not to take the apartment under those conditions?"

Answer: "That's correct." (T.94-99)

During the same testimony, the Complainant indicated that he liked the Appellant's apartment because it was close to his doctor, but then, subsequently, decided to move into the downtown Milwaukee area on Prospect Avenue instead. In further questioning, the Complainant was shown his rental application and, in response to questions regarding the same, answered the following questions with the following answers.

Question: "Well, from an economic point of view, you're not showing the ability to pay rent on the document, is that correct?"

Answer: "On this document it doesn't express my ability to pay rent, no."

Question: "So, then you gave Mr. Kitten Exhibit 7, which is a letter from your father, is that correct?"

Answer: "Yes, along with my bank statement."

In further questioning, the Complainant indicated the following answers to the following questions:

Question: "----Was it your understanding in that September 27th conversation with Mr. Kitten, that his concern was --- you might call it selfish economics – that he want --- that he was concerned about getting his money?"

Answer: "When Mr. Kitten had me sign the lease and then cashed the check for $1,925.00 and with all the information I had given him, I --- he made it clear he was comfortable up until that phone call, and so with that phone call, I didn't think that was his motive. I thought he was trying to take advantage of me, since he knew I had money in the bank. I felt he could --- I felt that he could take advantage of me by getting six months rent up front and maybe make interest on it. I don't know."

Question: "In your own mind on September 27th, you felt Mr. Kitten's motive was getting more money in his pocket?"

Answer: "Pretty much, I was confused. I thought we had a deal." (T.120-121)

Complainant also testified that he felt the Appellant was satisfied with not speaking with his doctor stating: "I had asked him, you know, if speaking with my doctor was contingent upon my renting....you know, him renting his unit, and he was like, well, no not really....then we kind of settled on it, that he was okay at this point with this issue and then we started arguing about the money issue again." Similar testimony was elicited from the Complainant's mother, Christine Cenname, who indicated that in a telephone discussion with her, the Appellant had raised two concerns, the first being whether or not her son was suicidal, to which her answer was "no" (T.144). She then testified that after that discussion "he proceeded to a second concern, which was the financial part of it" and that at no

time during the conversation did the Appellant indicate that he would not rent to the Complainant. (T.155)

During the initial meeting of the parties, the Complainant indicated that he had serious issues around food, body image, self-confidence, and self-esteem. (T.11) He indicated he was under a doctor's care and resided at Rogers Memorial Hospital. (T.12) He testified that he would continue to seek out-patient treatment after he left the residential treatment program (T.73-74), leaving the residential treatment program does not necessarily mean that a person has recovered (T.72-73), and that he believed his eating disorder to be a life-long disorder (T.83, 115). At the time of the hearing, a four-line letter from a Dr. Holbrook was admitted into evidence for what it was worth upon stipulation and order to avoid delay in the proceedings. The letter was dated September 9, 1999 (Exhibit 4), which letter diagnosed the Complainant as having bulimia nervosa. Deanna Mueller, office manager and social worker for the doctor at Rogers Memorial Hospital, testified at the hearing and in the answer to the question as to whether or not she could tell in layman's terms exactly what the diagnosis of bulimia nervosa means, she stated that she could not explain it in Spencer's case. (T.63) She also testified that she didn't know the treatment status for the Complainant or why he left Rogers Memorial Hospital (T.72). In answer to further questions regarding the Complainant's physical or mental conditions, she indicated "I am not a medical professional." (T.75) It is submitted that the testimony contained in this paragraph of the Statement of Facts is the only medical testimony in the record.

Following a full day of hearing in the housing discrimination matter, the Administrative Law Judge asked for briefs and written argument by the parties, which were submitted and, ultimately, on February 22, 2000, issued a Final Decision and Memorandum, including Findings of Fact, Conclusions of Law and an Order. A copy of the Final Decision and Memorandum is appended hereto as in the Appellant's Appendix. In the Administrative Law Judge's Conclusions of Law, among other things, she found that the Complainant is a person with a disability within the meaning of the WOHA and that the Respondent-Appellant (in this case) violated WOHA by exacting different or more stringent terms or conditions for the rental of a housing unit, because of a disability. The Administrative Law Judge, however, did not find an actual disability or record of disability stating in her opinion as follows:

> "The Administrative Law Judge is not convinced that the Complainant has established that his eating disorder was an actual physical or mental impairment that substantially limited one or more major life activities. While eating is a major life activity, the Administrative Law Judge determines that the lack of medical evidence regarding the exact nature, extent, severity and long-term prognosis of the Complainant's eating disorder makes it difficult to determine if the Wisconsin Open Housing Act (WOHA). The Administrative Law Judge is particularly concerned about the Complainant's failure to provide medical evidence regarding whether the Complainant's eating disorder is a permanent impairment of either his physical or mental capabilities. Without this information, the Administrative Law Judge determines that the Complainant cannot establish that he has an actual disability. This lack of medical information also prevents the Administrative Law Judge from finding that the Complainant has a record of having such an impairment.
>
> However, the Administrative Law Judge determines that there is sufficient evidence to establish that the Respondent regarded the Complainant's eating disorder as being a physical or mental impairment that substantially limited the Complainant's ability

> to enjoy major life functions. Specifically, the Respondent clearly showed by his actions and his statements that he believed that the Complainant's eating disorder would cause the Complainant to be unable to take care of himself and live on his own. Specifically, the Respondent believed that the Complainant would have a relapse of his eating disorder symptoms when living alone would require continuing hospitalization. Alternatively, the Respondent hypothesized that the Complainant's eating disorder would cause the Complainant to suffer from serious depression and attempt to commit suicide. Given the Respondent's believe that the Complainant's eating disorder would prevent him from being able to live on his own and take care of himself without further hospitalization or attempts on his life, the Administrative Law Judge determines that the Respondent regarded the Complainant as having a disability within the meaning of the WOHA."

ARGUMENT

1. There can be no finding of discrimination against prospective landlord because the Complainant did not prove the existence of a disability, which would qualify as such under the Wisconsin Open Housing Act.

   a) There is no medical evidence establishing a disability.

Deanna Mueller, a social worker and the office manager for Doctor Thomas Holbrook, the medical director of the Eating Disorder Center at Rogers Memorial Hospital, testified that a person is admitted to the In-Patient Residential Treatment Program when the person's eating disorder makes the person unable to function in his or her everyday activities (Trans. 58-62, 65). The Complainant was diagnosed as having bulemia nervosa (Trans. 62-63,66 Exhibit 4). Mueller is not a medical professional (Trans. 74-75). A letter authored by Dr. Holbrook and received into evidence upon stipulation of the parties (Trans. 57) stated that the Complainant's eating disorder was disabling (Trans. 71). The doctor did not testify at the

hearing. The only medical testimony in the record came from the above-named, Deanna Mueller, who also testified that she did not know the treatment status for the Complainant or why he left Rogers Memorial Hospital (Trans. 72) and, in answer to questions from the Appellant's Attorney regarding the Complainant's physical or mental condition, she indicated "I am not a medical professional" (Trans. 75).

The Administrative Law Judge, in her Memorandum Opinion, concluded that the Complainant had not established an actual disability stating in her Memorandum Opinion:

> "Without this information, the Administrative Law Judge determines that the Complainant cannot establish that he has an actual disability. This lack of medical information also prevents the Administrative Law Judge from finding that the Complainant has a record of having such an impairment."

She also states, in her Opinion, "while eating is a major activity, the Administrative Law Judge determines that the lack of medical evidence regarding the exact nature, extent, severity, and long-term prognosis of the Complainant's eating disorder makes it difficult to determine if the Complainant's disorder qualifies as an actual disability within the meaning of the Wisconsin Open Housing Act (WOHA)." The Administrative Law Judge then goes on to determine, however, that the Plaintiff's (Respondent's in the discrimination case) action indicated a belief that the eating disorder would prevent the Complainant from being able to live on his own and take care of himself without further hospitalization or attempts on his life and thus determined that the Respondent

regarded the Complainant as having a disability. The Appellate Court in its decision cites *School Board of Nassau County vs. Arline*, 480 US 273 284 (1987), as authority for its upholding the Administrative Law Judge's finding of perceived disability. On page 16 of the Appellate Court's Decision, the Appellate Court indicates that they find the Supreme Court's analysis in *Arline* analogous and helpful in the instant case stating: "The Term disability in the WOHA is defined as a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment or being regarded as having such an impairment." Citing Wisconsin Statute 106.04(1)(g) The Appellate Court then goes on to state: "Given the Supreme Court's *Arline*, analysis of the similar Federal Statute, it is no great leap for us to interpret the WOHA protecting a person who is "regarded" by a landlord as having an impairment that substantially limits major life activities, even if, in fact, he or she does not have such an impairment."

It is submitted that the analysis of the Administrative Law Judge and the Appellate Court is contrary to the standard set forth in more recent cases than that which is cited by the Appellate Court. The United States Supreme Court overruled the Equal Employment Opportunity Commission's Interpretive Guidelines as to disability in the case of *Sutton vs. United Airlines, Inc.*, 527 U.S. 471 (1999), when it ruled that someone with a physical or mental impairment must be viewed in the context of the person's status after using corrective measures. The Supreme Court also in 1999 issued its decisions in *Murphy vs. United Parcel*

Service, Inc., 527 U.S. 516 (1999) and in *Albertson's Inc. vs. Kirkingburg*, 527 U.S. 555 (1999). All of these cases limit the category of disabled persons under The Act by looking at the status of those persons after corrective measures have been taken, i.e. eyeglasses, poor vision in the *Sutton* case, medication for high blood pressure in the *Murphy* case and natural corrections by the alleged disabled person in the *Kirkingburg* case. Recent cases also indicate that when determining a limitation to any major life activity, there must be a comparison between the alleged disabilities of the Complainant comparing it to the abilities to the average person of the general population. *Maynard vs. Pneumatic Products Corporation*, 233 Fed. 3rd 1344 (11 Circuit 2000) and *Duncan vs. Washington Metropolitan Area Transit Authority*, 240 Fed. 3rd 1110 (D.C. Circuit 2001).

Under Section 106.04(1m), now Section 106.50(lm), the Wisconsin Statutes, "disability" is defined as a physical or mental impairment that substantially limits one or more major life activities, record of having such an impairment, or being regarded as having such an impairment. Under subsection (h), "discriminate" means to segregate, separate, exclude, or treat a person or class of persons unequally in a manner described in subsections (2), (2m) or (2r), because of sex, race, color, sexual orientation, disability....". Subsection (2b) makes it unlawful for any person to discriminate "by refusing to permit inspection or exacting or different or more stringent terms for the sale, lease, financing, or rental of housing". It is submitted that the case of *Sinkler vs. Midwest Property Management*, 209 Fed. 3rd 678, a 2000 case, best describes the burden of the

Complainant in arguing he suffers from a disability. In *Sinkler*, an employee claimed disability on the basis of a phobia and argued that the employer, Midwest, perceived her to be disabled because the employer believed her phobia limited the class of job she could perform more broadly than her phobia actually limited her. The *Sinkler* case set forth the following pertinent standards for claiming disability:

> The ADA prohibits employer discrimination against an employee on the basis of disability. 42 USC 12112(a). However, to make a prima fascia case for discrimination, Sinkler must demonstrate that her condition qualifies as a disability within the meaning of the ADA. See *Feldman*, 196 Fed. 3rd @ 789.

The Court then goes on to indicate:

> If Sinkler's condition does not raise to the level of a disability as defined by The Act, then she cannot recover even if Midwest terminated her expressly because of her condition. See *Skorp vs. Modern Door Corporation*, 153 Fed. 3rd 512, 514 7th Cir. 1998.

The Court in *Sinkler* then went on to say:

> to prevail on the Section 121.02(2)(c) claim that she was discriminated against by *Midwest* because it believed she was disabled. *Sinkler* must show that *Midwest* believed that she was unable to work in a particular class or broad range of jobs as required in the definition of disability under 121.02(2)(a)

A case which involved an eating disability such as that claimed here is *Weber vs. Strippit, Inc.*, 186 Fed. 3rd 907 (8th Circuit 1999). In that case, the person claiming disability had a heart condition, which among other things required certain dietary restrictions. In the *Weber* case, there was medical testimony by *Weber's* physician who offered his opinion that *Weber* was substantially limited in or more major life activities. The physician failed to

identify any particular one activity in which he was restricted as to condition, manner, or duration as compared to the average person in the general population.

The Court in *Weber* then went on to say:

> While *Weber* did face dietary restrictions and difficulty walking long distances or climbing stairs without getting fatigued, these moderate limitations on major life activities do not suffice to constitute a "disability" under the ADA.

The Court then found as a matter of law that *Weber* was not disabled because he failed to present sufficient evidence to establish that the nature, duration, and long-term impact of his medical problems caused him to be substantially limited in a major life activity and cited as authority *Aucutt vs. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir.1996). It is submitted that under the facts of this case, the Decision of the Administrative Law Judge and the law cited herein, it is clear that the Complainant did not establish that he was disabled as defined under the Wisconsin Open Housing Act and the Administrative Law Judge's finding that he was a person that fell within that Act was, therefore, clearly erroneous.

The Respondent correctly argues that the Department's Findings of Fact must be affirmed if they are supported by substantial evidence in the record and that the weight and credibility of the evidence are matters for the agency and not for the Reviewing Court to evaluate. Appellant argues, however, that the Reviewing Court need not give deference to the Department's interpretation of

law and the Department's findings may, in fact, be overturned if they are not supported by "substantial evidence".

The most recent case dealing with an agency's determination as it relates to a reviewing court's power is *Walmart Stores, Inc. vs. LIRC*, 621 NW2d 633 240 W2d 209 (2000). The *Walmart* case dealt with a discharged employee, who had been discharged because of a behavioral outburst and dealt with the question of whether or not expert testimony was necessary to establish a causal connection between the outburst and the alleged disability of the discharged employee. In reviewing the role of the court as compared to the agency in making determinations, the Appellate Court in *Walmart* stated, in part:

> "We independently review the Commissioner's determination not the decision of the Circuit Court. *Barnes vs. DNR*, 178 W2d 290, 302, 506 NW2d 155 (Court of Appeals 1993)...."
>
> The scope of our review depends initially on whether the agency determination under review is its finding of fact or its interpretation of law, Wisconsin Statutes Sec. 227.53(3)(5)(6)(1997-1998)."

In the *Walmart* case, it was conceded that the employee had a disability, but the question was whether or not the outburst, which lead to his dismissal was caused by that disability and whether or not expert testimony was required in that regard. In stating the Standard of Review, the Appellate Court in *Walmart* further went on to state:

> "Our review of an Agency's Factual Finding is highly deferential: if the Agency's action depends on any fact found by the Agency in a contested case proceeding,

> the Court shall not substitute his judgment for that of the Agency as to the weight of the evidence on any disputed finding of fact. The Court shall, however, set aside agency action or remand the case to the Agency if it finds that the Agency's action depends on any finding of fact that is not supported by substantial evidence in the record. Wisconsin Statute 227.57(6) "Substantial Evidence" is that quantum of relevant evidence as a reasonable mind might accept as adequate to support a conclusion and we will only set aside an Agency's decision where "upon examination of the entire record, the evidence including the inferences therefrom, is found to be such that a reasonable person acting reasonably could not have reached the decision from the evidence and its inferences." Citing *Target Stores*, 217 W2d @ 11 576 NW2d 545.

Based on the foregoing, it is further submitted that the Administrative Law Judge's Conclusion of Law was also clearly erroneous.

B. There was no evidence of substantial impact on the Complainant's major life activities

The medical record in this case consists solely of Exhibit #4, in which Dr. Thomas Holbrook, in letter form, indicates that the Complainant was admitted to Rogers Memorial Hospital for an eating disorder from May 11, 1998 to October 22, 1999 (obviously, the wrong date inasmuch as the Complainant indicated that he took occupancy of his current apartment in October, 1999), with a diagnosis of bulimia nervosa. There was no medical testimony regarding the specific nature of the Complainant's condition. As stated there is no definition in various medical or legal/medically related treatises of a disorder called bulimia nervosa. While it is

true this case is not based upon a finding of actual disability, but rather perceived disability, it is submitted that there must be a disability to perceive.

The Appellate Court in its decision on page 16, in upholding the hearing examiner's decision, refers to the examiner's finding to the effect that the Plaintiff demonstrated by his actions in statements that he believed that the Complainant's eating disorder might cause him to be unable to take care of himself and to live on his own, that the Plaintiff's statements reflected a belief that the Complainant would have a relapse of his eating order symptoms when living alone and would require further hospitalization and that the eating order could be associated with depression, causing the Complainant to attempt to commit suicide. It is submitted that these findings by the Administrative Law Judge and cited with approval by the Court of Appeal, do not arise to the level necessary to establish a "substantial" impairment of a major life activity. As stated in *Weber supra*, there must be sufficient evidence to establish the nature, duration, and long-term impact of the medical problems that cause a Complainant to be substantially limited in a major life activity. In addition, as indicated above, recent cases of *Duncan* and *Maynard supra* indicate that there must be a comparison with other persons in the general community to establish a substantial limitation in a major life activity. The EEOC's regulations and its interpretive guidelines both state that someone is substantially limited if that person is significantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner or duration under which the average person in

the general population can perform that same major life activity. 29 C.F.R. 1630.2(j), 29 C.F.R. PT 1630 APP. 1630.2(j). There is absolutely no medical evidence to indicate that the Complainant in the instant case was substantially limited in any manner. His diagnosis was an eating disorder and it is clear from the testimony that this was not an obvious eating disorder at least to the Plaintiff because even the Plaintiff's testimony indicated that Plaintiff had made a comment at the initial meeting to the effect, "yeah, I know what you mean about overeating and he asked questions you know about whether it was overeating over undereating" (Transcript 11-12) as pointed out by Plaintiff's counsel in prior briefs. While a letter from the Complainant's doctor indicated that he had bulimia nervosa, the doctor's secretary was unable to define the Complainant's condition and both *Dorland's Illustrated Medical Dictionary 24th Edition,* and *American Jurisprudence Proof of Facts 2d* dealing with discrimination against the obese commencing on page 249 in Volume 36, deal with conditions called bulimia or anorexia nervosa, there is no reference whatsoever to a condition of "bulimia nervosa", which Complainant supposedly suffered from.

C. There was no evidence as to what life activities, if any, were affected.

It is submitted that in the *Weber case supra*, the Complainant failed, even though he established substantially more by evidence than was established by the Complainant in this case. In the *Weber* case, he had medical testimony from his physician, who offered an opinion that *Weber* was substantially limited in one or more major life activities, but the Court found he failed to establish a disability

because "he repeatedly failed to identify any particular activity in which *Weber* was restricted as to condition, manner or duration as compared to the average person in the general population. *Weber* did identify specific activities that were impacted by his heart disease, including eating, walking upstairs, shoveling snow, gardening, mowing the lawn, playing tennis, fishing, and hiking. Aside from eating and walking, however, none of these activities qualify as major life activities. While *Weber* did face dietary restrictions and difficulty walking long distance or climbing stairs without getting fatigued, these moderate limitations on major life activities do not suffice to constitute a "disability" under the ADA (citing *Land vs. Baptist Medical Center*, 164 F3d 423 (8th Cir. 1999) The *Land case supra*, is a case in which a person was determined to not be disabled despite severe allergic reaction to certain foods containing peanuts or peanut byproducts because she could consume other foods and her physical ability to eat was not restricted.

Under the analysis set forth above, it is clear that the Complainant, in this matter, did not have a disability, which would fit the definition under the WOHA and that there is no other evidence in the record, which would cause any third party to believe that the Complainant's condition was any different or worse than what the Plaintiff himself claimed as his base disability.

II. PLAINTIFF COULD NOT BE GUILTY OF PERCEIVED DISABILITY BECAUSE HIS PERCEPTIONS WOULD NECESSARILY HAVE BEEN OF A CONDITION WHICH WAS NOT A QUALIFYING DISABILITY.

The *Weber case supra* deals specifically with perceived disability and jury instructions relative to the same and the test to be applied. In the *Weber case*, the Court states:

> *Weber's* claim that the court's instruction was more akin to an actual disability instruction, not a perceived disability instruction, also fails. *Weber* contends that the test for perceived disability is whether Defendant treated Plaintiff adversely because of his or her feelings about the Plaintiff's physical or mental impairment. This is not the test. Rather the test is whether Defendant treated Plaintiff adversely because it regarded him as having an impairment that substantially limits one or more major life activities. (Citing *Murphy vs. United Parcel Service*. In *Weber*, the court upheld a jury instruction "that it is your duty to determine whether Defendant's regarded Plaintiff as having a physical impairment that substantially or materially limits a major activity, not whether the Plaintiff actually had such an impairment".

Two additional Federal Appellate Court cases, it is submitted, also support the position of the plaintiff. In the first case, *Brunko vs. Mercy Hospital*, 260 F.3rd 939 Court of Appeals, District 8, an Iowa case decided in 2001, it is submitted defines the basis behind the recognition of "perceived" disabilities in the field of discrimination. In the *Brunko* case, the hospital employee had a 40-lb. weight-lifting restriction and was considered to be not disabled on the basis of the employer's perception, because "the perception was not based on any myths or archaic attitudes about the disabled...." Rather, in the *Brunko* case, the 40-lb restriction was placed upon the employee, because of her doctor's

recommendation. The *Brunko* case indicated that the ADA provisions regarding perceived disabilities are intended to combat the effect of archaic attitudes, erroneous perceptions and myths that work to the disadvantage of persons with regarded as being disabled.

In the 2001 California case, *Thornton vs. McClatchy Newspapers, Inc.*, 789 F.3rd 261, the Appellate Court indicated that "as with real impairments, a perceived impairment must be substantially limiting and significant to be the basis for ADA relief". In the latter cited case, summary judgment was granted to an employer, because although the employer may have perceived the employee to have an impairment, the impairment, itself, did not rise to the level of being substantially limiting and significant.

The only evidence in the record in this case of any impairment on the part of the Complainant was that he had been hospitalized for an eating disorder and was on the verge of being released with certainly the expectation that he would be living on his own in an apartment setting. There is absolutely no medical evidence in the record that would furnish the information regarding the nature of what life activity was limited as regards the Complainant, the duration of the same, or how the Complainant would compare with other members of the community all as required by the law set forth above. Clearly, the only information which the Plaintiff had regarding the Complainant's condition or affliction was the statement from the Plaintiff, himself, to the effect that he had an eating disorder for which he was being treated and the Complainant's mother's statement in the telephone

conversation the Plaintiff had with her to the effect that the Complainant at one time had had some suicidal tendencies but that was not a concern at the present time. Thus, the Plaintiff's perception of the Complainant's disability was necessarily limited to the question of the eating disorder with no further specifics. It is submitted that one cannot be held to have perceived disability when the perception held by the person accused is no more than the perception of a condition which is, in fact, not a disability. All of the perceived disability cases reach a higher level, i.e. where the employer considers the disability to be considerably greater than it actually is. In this case, that perception could not have been made by the Plaintiff, because he simply had insufficient information to know anything more about the Complainant than that he "had an eating disorder".

III. PLAINTIFF'S MOTIVES WERE STRICTLY ECONOMIC.

In its decision of the Appellate Court of page 9, the Appellate Court indicates "Kitten did not usually ask other potential renters for six months' rent in advance or permission to speak to their doctors before agreeing to rent to them". That is a correct statement except that it ignores the fact that in the entire record, the only statement relative to requesting additional rent, as set forth in the Statement of the Case above, was that the Plaintiff did not usually request additional rent because he did not run into the situation frequently where unemployed persons applied to rent his apartments, which are in the upper level of rental cost in the area. The uncontradicted testimony of the Plaintiff, however,

was to the effect that given similar economic circumstances, his actions would have been the same as they were in this case. Plaintiff calls the Court's attention to the following which it is submitted support the Plaintiff's position that the request for additional rent from the Complainant was based solely upon economics:

1) The Plaintiff has been engaged in real estate practice for approximately 25 years prior to the incident, which gave rise to the above case (Transcript 163). At one period of time, he had managed up to a 1,000 rental units on behalf of himself and his clients and, at the time of the hearing in this matter, was managing his own rental properties of approximately 164 units. During the entire period of time, the Appellant was engaged in the residential rental business, it was unrefuted that there were no prior complaints of discrimination made or filed against the Appellant (Transcript 140-164). The Complainant acknowledged at the time of the first meeting with the Plaintiff that he was not working (Transcript 9). On the rental application, he listed no employment, listed his address as an address in the state of Ohio, indicated he had one VISA account, listed his bank as Merrill Lynch with a savings and checking account (Exhibit #9). During the initial meeting, he disclosed after having initially falsified his residence, that he was residing at a treatment center at Rogers Memorial Hospital, voluntarily disclosing "I have serious issues around food and body image and self-confidence, self-esteem issues, and things of that nature". (Transcript 11) In spite of the false address given on the rental application and the Complainant's disclosure relative to

hospitalization and his disclosure of what he considered to be his physical or mental problems, the Plaintiff presented him with a lease and accepted the Complainant's rental application (Exhibit #3). Both parties conceded that the rental application was being taken subject to the results of her credit report (Transcript 106). The Plaintiff did not receive an actual credit report until September 30, 1998 (Transcript 174-175, 197-198 – Exhibit #13) and was leaving town for about six months, shortly after the Complainant was to take occupancy (Transcript 28-29, 94-95, 120-121, and 129). Apparently, the Complainant did not consider the request for additional six month's rent because of his economic condition to be unreasonable inasmuch he initially accepted the Plaintiff's proposal in that regard (Transcript 28-31). The Complainant, in his testimony, acknowledged that during a September 30th telephone discussion between the parties, which was rather lengthy, it was about "the financial issue" (Transcript 42-43). He also indicated at the time of the conversation that the health issue was settled and "then we started talking about the money issue" (Transcript 44). The Complainant acknowledged, under questioning, that from an economic view, he did not show the ability to pay rent on his rental application (Transcript 102-104) and that he believed that the Plaintiff's concern was economic based upon a conversation of September 27th (Transcript 120-121). Complainant also acknowledged that speaking with the Complainant's doctor was not an issue, but money was (Transcript 144) and the Plaintiff's mother testified that after she

satisfied the Plaintiff's concern that her son might be suicidal, the discussion then proceeded to the financial part of it (Transcript 155).

The Administrative Law Judge, in her Findings of Fact and Decision, relied heavily upon inquiries made by the Plaintiff in two categories: 1) being whether or not the Complainant would be able to pay the rent and would be a good tenant (contained in Findings 19 and 20) and whether or not the Complainant might be suicidal, referring to a hypothetical situation, where exhaust fans from a possible suicide could affect the health of other tenants (Findings 19 and 20 of the Administrative Law Judge). The same issues are raised in the Administrative Law Judge's Memorandum Decision, in paragraph numbered 2 thereof. It is also referred to in the Appellate Court Decision in Finding 8 on page 5 and paragraph 11 on page 7. It is submitted that the two inquiries made by the Plaintiff are appropriate: the first, in a true business sense and the second, as authorized by law for the protection of other tenants. Wisconsin Statute 106.50(5)(m)(d) states:

> Nothing in this Section requires that housing be made available to an individual whose tenancy would constitute a direct threat to the safety of other tenants or other persons employed on the property or whose tenancy would result in substantial physical damage to the property of others, if the risk or direct threat or damage cannot be eliminated or sufficiently reduced to reasonable accommodations. A claim that an individual's tenancy poses a direct threat or a substantial risk of harm or damage must be evidence by behavior by the individual which caused harm or damage was directly threatened, harmed, or damaged, or which caused reasonable fear of harm or damage for the tenants or persons employed on the property or the property....

While it is referred to above, the case law to draw upon both in the State and Federal Courts and regulations deals mainly with employment. Perceived

impairment is difficult. While the regulations prevent discrimination against someone who is regarded as having an impairment, the examples cited normally are obvious impairments, such as a person who is scarred from burns, but experiences no other limitations, or a person who is incorrectly classified as mentally-retarded and other visible physical disabilities (see 29 C.F.R. Section 1630.2(g) (1998). In the instant case, there was no obvious impairment and the only reason that the Plaintiff had any knowledge of the Complainant having any condition beyond normal, was the fact that he had made his initial telephone call from Rogers Memorial Hospital and at the initial meeting of the parties, openly discussed his alleged "eating problem" with the Plaintiff. The Plaintiff had indicated to the Complainant that he had discussed the Complainant's alleged medical condition with his sister, who is a nurse, and was told that that type of condition involves some depression (Finding 19 of the Administrative Law Judge – page 5). Again, attempting to equate the existing case with the reported regulations and law relating to employment, inquiries allowed of a prospective employee are set forth in 42 U.S.C. paragraph 12112(b)(6)(1994) and 29 C.F.R. Section 1630.10, .14, and .15. Under those regulations, employers may not diagnose a disability before a job offer has been extended, but an employer may ask the applicant about his or her ability to perform specific job functions. If an applicant requests a reasonable accommodation during the hiring process and a need for the accommodation is not obvious, the employer may ask for reasonable documentation about the disability. Once a job offer has been made, an employer

may inquire as to the ability of an employee to perform an essential function of a job and may inquire as to whether or not the employee proposes a "direct threat" in the work place, i.e. a significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced with a reasonable accommodation.

Drawing an analogy from the workplace cases. Inquiries are permitted as it relates to the ability of a prospective employee to perform a job and whether or not that employee might pose a direct threat. It is submitted that in the instant case, the analogous situations are the ability of the prospective tenant to pay the rent, honor the obligations under the lease, and not pose a direct threat to other tenants. All of the Plaintiff's inquiries were directed toward those two aspects of the transaction between the parties. In order for the Plaintiff to be guilty of discriminating against the Complainant, the discrimination must necessarily be because the Plaintiff perceived the Complainant to have a disability, which limits one or more major life functions. The ability to pay rent over a short six-month period, it is submitted, is not a limitation upon a major life function. The other inquiry made by the Plaintiff, i.e. whether or not the Complainant was suicidal, it is submitted, was permissible under the direct threat statute and regulations, but in any event, the Plaintiff was fully satisfied in that regard and was more than willing to allow the Complainant to move into the Plaintiff's apartment complex. The sole motivating factor then became whether or not the Complainant would have the ability to pay rent over the six-month period following commencement of the

lease. While the Plaintiff clearly indicates that even this demand was ultimately dropped, because the Plaintiff became satisfied with the Complainant's financial position, that question became a disputed fact, which was decided against the Plaintiff by the Administrative Law Judge. Conceding that point, however, the Complainant still does not fall within the category of a person with a perceived disability, because there was not evidence that the Plaintiff perceived the Complainant to have anything other than what was related to him by the Complainant. Keep in mind that the uncontradicted testimony of the Plaintiff was that given a similar economic fact situation with any other prospective tenant, he would have treated that tenant the same as he treated the Complainant in this action, irrespective of physical or mental condition. It is submitted that the perception of a Plaintiff as to whether or not the Defendant was able to pay rent, even if that perception related to a possible relapse of his eating disorder, would be no different than the potential for someone who had any other temporary physical condition similar to a cold, the flu, pneumonia, or a broken limb from suffering a relapse and those persons would certainly not fall within the parameters of disabled persons or persons who could be perceived as the same.

CONCLUSION

The Landlord/Appellant, in this case, was faced with a tenancy application submitted by a person with virtually no credit history, no employment, and no prior rental history, but yet a person, who based upon certain unsubstantiated documentation, seemed to have sufficient funds to pay rent in a rather upper-level rental market. The only knowledge that the Appellant acquired regarding the Complainant's alleged disability was information transmitted by the Complainant himself, which indicated that he was a college graduate, had funds on deposit, and was being released from a hospital facility, for which he was being treated for an eating disorder. Persons with disabilities are protected from discrimination, if they have or are perceived to have a disability, which limits major life activities. There was nothing from the Complainant's appearance, or even statements from the Complainant himself, regarding his condition that would indicate a disability that would rise to the level of that required by law. The fact that the Complainant alleged to have an eating disorder, which was treated to the point where he was being released from a medical facility and ready to live in an apartment setting on his own, would be contrary to that level of disability. The rental was to commence on the 1st day of October, going into the slow-rental season, and the Appellant had a six-month "No Move-Out Policy" and was leaving the city for an extended period of time and was concerned about whether or not he would be getting his rent through the winter months. It is submitted that that was the only concern of

the Appellant once he was convinced that the Complainant did not constitute a direct threat to the Appellant's other tenants or the Appellant's property. While the Appellant and Complainant differ as to whether the Complainant would have been allowed in the apartment without payment of the additional rent, this is a disputed fact, which it is submitted would not affect the outcome of the case either way, when applying the law cited above to the facts. Clearly, the Appellant had valid economic reasons for requesting, as he had sometimes done in the past, additional security to guarantee payment of future rent, but those concerns were strictly economic and not based upon any perception of disability. It is further submitted that one cannot be guilty of perceived disability, when the only thing which could conceivably be perceived, is not a disability, at all. From the record in this case, the Complainant's condition would not be much different from a person who has a relapse of the flu. It is submitted that the intent of the perceived discrimination portion of the Fair Housing Law is to protect those who could be good employees or good tenants, but are not denied the opportunity, because of an erroneous observation of an employer or landlord, i.e., watching someone with a limp.

Dated, this 15 day of November, 2001.

Respectfully submitted,

PHIL ELLIOTT, JR.

STATE OF WISCONSIN

SUPREME COURT

APPELLANT'S BRIEF and APPENDIX

DONALD R. KITTEN,

Plaintiff-Appellant,

Case No. 00-3562

-vs-

Circuit Court Case No. 00-CV-559

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondent -Respondent.

I hereby certify that this brief conforms to the rules in x. 809.19(8)(b) and (c) for a brief produced using the following font.

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters for full line of body test. The length of this brief is 33 pages and 7938 words.

Signed this 15 day of November, 2001

PHIL ELLIOTT, JR.
Attorney at ~~Law~~
State Bar No. 01008991

APPENDIX

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT
EQUAL RIGHTS DIVISION

Spencer Scott Cenname
1660 N. Prospect Ave., #2703
Milwaukee, WI 53202
Complainant

vs.

FINAL DECISION & MEMORANDUM

ERD Case # 199900994

Donald R. Kitten
S73 W17117 Briargate Lane
Muskego, WI 53150
Respondent

In a complaint filed on March 10, 1999, with the Equal Rights Division of the Department of Workforce Development, the Complainant alleged that the Respondent violated the Wisconsin Open Housing Act (WOHA) by exacting different or more stringent price, terms or conditions for the rental of a housing unit because of a disability. In an Initial Determination issued on April 29, 1999, an investigator for the Division found that there was probable cause to believe that the Respondent violated the Act as alleged in the complaint. This matter was certified to the Hearing Section for a hearing on the merits of the Complainant's claim.

This matter come on for hearing before Administrative Law Judge Alice E. DeLaO on September 9, 1999 in Waukesha, Wisconsin. The Complainant appeared in person and by his attorney, Sandra Graf Radtke, from the law firm of Murphy, Gillick, Wicht & Prachthauser. The Respondent appeared in person and by his attorney, Phil Elliott, Jr., from the law firm of Elliott, Elliott & Staskunas. The parties were provided the opportunity to file briefs in this matter. The record in this matter closed on November 5, 1999 with the filing of reply briefs by the parties.

Based on the evidence received at the hearing in this matter, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Spencer Cenname (Cenname) moved to the Milwaukee, Wisconsin metropolitan area from Ohio in 1997. On May 11, 1998, Cenname was admitted to Rogers Memorial Hospital for treatment of bulimia nervosa, an eating disorder. Cenname was admitted for inpatient treatment after it was determined by his physician, Dr. Thomas L. Holbrook, that Cenname's eating disorder was preventing Cenname from being able to function in every day activities and required around-the-clock treatment. Dr. Holbrook is the director of the eating disorder center at Rogers Memorial Hospital. Dr. Holbrook is a psychiatrist.

2. Bulimia nervosa affects a person both physically and mentally. People who suffer from bulimia nervosa suffer from a variety of symptoms. Cenname's symptoms include binge eating, purging, and compulsively exercising to rid himself of the food he has eaten. Cenname also has serious issues with his body image, and sense of self-esteem. Additionally, Cenname experiences anxiety and has had difficulty sleeping. Sometime prior to September of 1998, Cenname had also experienced suicidal thoughts at times.

3. As of early September of 1998, Cenname had decided to leave the eating disorder center at Rogers Memorial Hospital because his treatment at the hospital was costing approximately $400.00 per day. Cenname decided to find a quiet apartment where he could focus on overcoming his eating disorder and still receive outpatient treatment at the hospital at a lower cost. In anticipation of Cenname leaving the hospital, an extensive treatment program was put together by Cenname's treatment team to help Cenname deal with his eating disorder after he was no longer receiving 24-hour care in the hospital. Cenname was almost 28 years old in September of 1998.

4. Although Cenname had previously earned a college degree in international relations from Boston University, Cenname was not employed in 1998. Cenname was able to pay for his lifestyle by using money he received from family investments. As of September of 1998, Cenname had approximately $40,000.00 in accounts at Merrill Lynch. Cenname also received a guaranteed monthly income of $3,000.00 after taxes. Cenname's father, August Cenname, served as Cenname's financial advisor. August Cenname is a senior vice president at Merrill Lynch. Cenname's parents live in Columbus, Ohio.

5. On Tuesday, September 8, 1998, Cenname called Donald R. Kitten (Kitten) to inquire about an apartment that Kitten had advertised for rent. During the conversation, Kitten told Cenname that Cenname must have a pretty good job to be able to pay $925.00 per month for rent. Cenname told Kitten that Cenname was not working. Cenname told Kitten that Cenname had a financial statement and a letter from his banker guaranteeing Cenname's income and explaining his money situation. Kitten made arrangements to meet Cenname on September 9, 1998. Kitten told Cenname to bring his checkbook because the apartments "go fast" and Cenname might want to give Kitten a check right away.

6. As of 1998, Kitten had been in the business of rental property management for approximately 24 years. Prior to 1989, Kitten had managed both his own rental properties and the rental properties of others. Since 1989, Kitten had only managed his own rental properties. Kitten owned and managed approximately 140 rental units in September of 1998. During his career as a rental property manager, Kitten had managed as many as 1,000 units at one time.

7. On Wednesday, September 9, 1998, Cenname met Kitten at the apartment located at 317 South Brookfield Road. The apartment complex owned by Kitten on South Brookfield Road had condominium quality apartments with private entrances. The apartment complex consisted of 56 units. The unit that Cenname looked at had two bedrooms, a fireplace, a den, a living room, a large kitchen, carpeting and high ceilings, as well as an attached garage. The apartment was clean and located in a quiet,

residential area. The complex was approximately one year old at the time that Cenname viewed the property. The monthly rent total for the apartment was $925.00 a month and Cenname would be expected to pay for all utilities, except for water and sewer charges. Cenname felt that the fireplace might help him to deal with the severe body temperature fluctuations that he experienced. Cenname also liked the location of the apartment, since it provided easy access to the freeway and would allow him to easily go to his medical appointments. Generally, Cenname believed that the apartment at 317 South Brookfield Road would reduce the stress in his daily life and allow him to focus on dealing with his eating disorder problems.

8. On September 9, 1998, Cenname told Kitten that he liked the apartment and wanted to rent it. Cenname and Kitten then sat down to discuss Cenname's financial situation. Cenname provided Kitten with a letter from his father, August Cenname, written on Merrill Lynch stationery that explained Cenname's current account balances and that he received $3,000.00 per month after taxes. The letter also explained that Cenname's account balances had steadily increased over the 13 years that Cenname had been a customer of Merrill Lynch and that Cenname had always promptly paid his Visa account. Cenname also gave Kitten a photocopy of an account statement from Merrill Lynch that showed that Cenname had $40,446.00 in Merrill Lynch accounts as of July 31, 1998. Cenname also showed Kitten a handwritten document that had bank account numbers and the names and telephone numbers of people who could be contacted to provide personal and financial references for Cenname. One of the references was for one of Cenname's prior landlords. Kitten understood from his discussions with Spencer Cenname that August Cenname was Spencer Cenname's father. Based on the information provided by Cenname, Kitten began to write up a lease agreement.

9. While Kitten was writing up the lease agreement on September 8, 1998, Kitten began asking Cenname where he lived. Cenname did not want to tell Kitten that he was currently living at a hospital and being treated for an eating disorder, so Cenname told Kitten that he was living with friends. Kitten continued to ask Cenname about where he was living until Cenname felt compelled to admit that he was living at Rogers Memorial Hospital and that he was being treated for an eating disorder. Kitten said that he knew from his "caller ID" device that Cenname had called Kitten from the hospital. Kitten then told Cenname that Cenname looked like he did not eat enough. Cenname and Kitten then had a short discussion of Cenname's eating disorder.

10. As Kitten went through the lease with Cenname on September 9, 1998, Kitten pointed out that Cenname would be required to pay Kitten a deposit of one month of rent in advance and $1,000.00 for a security deposit. Kitten explained to Cenname that any money paid to Kitten on September 9, 1998 would not be refunded unless Kitten denied Cenname occupancy. Finally, Kitten pointed out that the lease required an occupant to give 90 days' written notice to vacate and that tenants were not allowed to move out during the eight-month period from October 1 through the end of May. After the lease form was completed by Kitten, Cenname signed the lease and gave Kitten a check for $1,925.00 to cover the first month's rent and the security deposit. The lease was for one year and began on October 1, 1998. Cenname understood that Kitten planned to have a credit check run on Cenname before Kitten would sign the lease. However, when Cenname asked Kitten about the requirement, Kitten indicated that he did not

think that it would be a problem. Before Cenname left, Cenname asked Kitten "where do we stand" and Kitten said the place was Cenname's and directed Cenname to call Kitten a week before he planned to move into the apartment. Cenname asked for a copy of the lease that he had signed. Kitten told Cenname that Kitten would mail Cenname a copy.

11. On Friday, September 11, 1998, Kitten received a verbal credit report for Cenname. The report revealed that Cenname's credit history was brief, but good.

12. On Monday, September 14, 1998, Kitten cashed Cenname's check for the first month's rent and for the security deposit.

13. Kitten did not attempt to contact Cenname during the period from September 9, 1998 through September 26, 1998.

14. On Sunday, September 27, 1998, Cenname called Kitten to let Kitten know that Cenname planned to move into the apartment at 317 South Brookfield Road on the following Friday, October 2, 1998. Cenname asked about getting into the apartment and also asked why Kitten had not sent Cenname a copy of the lease. Kitten told Cenname that he was concerned that Cenname might go back into the hospital and Kitten would not be able to get his rent money. Kitten told Cenname that he would "feel better" if Cenname paid Kitten six months of rent in advance. Kitten did not think that paying the money should be a problem for Cenname, since Cenname had over $40,000.00 in his accounts at Merrill Lynch. Cenname was very nervous and confused by Kitten's request for six months of rent in advance. Cenname agreed to pay six months of rent in advance to Kitten because he was afraid that if he did not agree to Kitten's request that Kitten would not rent to him. Cenname then asked Kitten to fax a copy of the lease to Cenname at the hospital. Kitten then made arrangements to meet Cenname at the apartment on Friday afternoon on October 2, 1998.

15. On September 27, 1998, Cenname received a message that he should call Kitten. Cenname eventually spoke with Kitten again by telephone on Monday, September 28, 1998. Kitten arranged with Cenname to change the time that Kitten was to meet Cenname on Friday, October 2, 1998. Kitten then asked Cenname if Kitten could call his doctor. Cenname was very nervous that if he did not let Kitten speak to his doctor that Kitten would not rent the apartment to him. Cenname told Kitten that he would have his doctor call Kitten. Kitten asked Cenname to tell him the name of his doctor and Cenname complied. Cenname then told Kitten that he was uncomfortable with paying Kitten six months of rent in advance. Kitten reiterated his concern that Cenname would have a relapse and go back into the hospital. Kitten also stated that he was concerned that Cenname would pay the hospital first and that Kitten would not be able to get his rent money. Although Cenname did not directly state to Kitten that Cenname would not pay an additional six months of rent in advance, Cenname made it clear to Kitten that he was not happy with the request for an additional six months of rent. Cenname reiterated his request that a copy of the lease be faxed to him at the hospital.

16. On Tuesday, September 29, 1998, Kitten called Dr. Thomas L. Holbrook's office and left a telephone message for Dr. Holbrook. In the telephone message, Kitten asked to

speak with Dr. Holbrook about Cenname. Deanna Mueller, Dr. Holbrook's office manager, heard Kitten's telephone message and contacted Cenname to see if Cenname would give permission to Dr. Holbrook to discuss Cenname's medical condition with Kitten. Cenname was surprised and upset to hear that Kitten had called Dr. Holbrook's office without Cenname's permission or knowledge. Cenname refused to grant Dr. Holbrook permission to discuss his medical condition with Kitten. As a result of Cenname's decision, no one from Dr. Holbrook's office contacted Kitten.

17. Directly after speaking to Mueller on Tuesday, September 29, 1998, Cenname called Kitten. Cenname told Kitten that it was inappropriate for Kitten to call Cenname's doctor and that Cenname was upset about Kitten's actions. Kitten insisted that he needed to speak to Cenname's doctor and that he needed the six months of rent paid in advance. Cenname again told Kitten that Kitten's actions were not appropriate. Cenname ended the conversation by again asking Kitten to fax Cenname a copy of the lease at the hospital.

18. Later in the afternoon on September 29, 1998, Kitten faxed to the hospital a copy of the lease that Cenname had signed. The lease sent to Cenname was the same one that Cenname had signed on September 9, 1998. The lease agreement did not have Kitten's signature on the lease. The lease only contained Cenname's signature.

19. On Wednesday, September 30, 1998, Cenname called Kitten and told Kitten that he would not pay Kitten six months of rent in advance and that Kitten could not speak to Cenname's doctor. Cenname told Kitten that Cenname's health was not Kitten's concern. Kitten argued that it was his concern because Kitten was concerned about Cenname. Cenname argued that Kitten's only concern was whether Cenname could pay the rent and if Cenname would be a good tenant. Cenname also told Kitten that Cenname had given Kitten the information necessary to verify Cenname's financial status and his suitability as a tenant. Kitten insisted that it was his right to inquire about Cenname's medical condition because Kitten had concerns and needed to protect the tenants in the other units. Cenname then asked Kitten what Kitten wanted to know. Kitten said that his sister was a nurse and that she told Kitten that Cenname's condition involved some depression. Kitten then began to describe a hypothetical situation where he came to the apartment complex and found Cenname in his car with the garage door closed and the exhaust fumes running from his car. Kitten told Cenname that such a situation would damage the rental unit. From listening to Kitten's story, Cenname determined that Kitten was trying to ask if Cenname was likely to try to commit suicide. Cenname told Kitten that Cenname was not suicidal. Cenname then asked Kitten if speaking to Cenname's doctor was a condition of renting the apartment. Kitten said, "No, not really." Cenname told Kitten that it was unreasonable for Kitten to ask for six months of rent in advance. Cenname then asked Kitten why Kitten had not signed the lease. Kitten told Cenname that since Cenname had signed the lease, Cenname had to pay the rent. However, Kitten argued that since Kitten had not signed the lease, Kitten did not have to let Cenname have the apartment. Cenname insisted that since Kitten had cashed Cenname's check that Kitten had to abide by the original terms of the lease. Kitten kept insisting that he needed the six months of advance rent. Cenname told Kitten that if he wanted more financial information that Kitten should talk to Cenname's financial advisor. Kitten laughed and said, "That's your father." Cenname said, "That's

right" and gave Kitten his parents' home telephone number in Columbus, Ohio because Cenname believed that his father was working at home. Kitten said that he was going to call Cenname's father and that he would get back to Cenname.

20. At approximately 3:00 p.m., on Wednesday, September 30, 1998, Kitten called Cenname's parents' home in Columbus, Ohio. Cenname's mother, Christina Cenname, answered the telephone. Kitten explained who he was and asked to speak to August Cenname. Christina Cenname told Kitten that her husband was not home. Kitten asked Christina Cenname to take a message for him. Kitten then explained that Spencer Cenname had told Kitten to call his doctor to ask questions, but then told Kitten to call August Cenname instead. Kitten said that he had two concerns. Kitten then began discussing that the garages were attached to the units and that if something happened the gas would enter the other units. Christina Cenname asked if Kitten was concerned about Spencer Cenname attempting to commit suicide. Kitten responded, "Yes." Christina Cenname told Kitten that suicide might have been an issue at one time, but that it was not a concern presently. Kitten then asked Christina Cenname if she and her husband would be willing to co-sign the lease to be responsible for the rental payments if there was a need for Spencer Cenname to return to the hospital. Christina Cenname assured Kitten that Spencer Cenname had a guaranteed income of $36,000.00 per year after taxes. Christina Cenname also told Kitten that she and her husband would co-sign the lease but she told Kitten that Kitten had to let Spencer Cenname know that he was faxing the contract for them to sign.

21. Spencer Cenname called Kitten again on September 30, 1998. During the telephone conversation with Kitten, Kitten told Cenname that he had spoken with Cenname's mother because his father was not home. Kitten told Cenname that Christina Cenname had said that it was okay to talk to her. Kitten went on to state that Cenname's mother had said that Cenname should "choose his poison" between paying six months of rent in advance or having his parents co-sign the lease. Kitten asked Cenname which choice he was going to make. Cenname told Kitten that he needed to think about it and ended the telephone conversation.

22. After talking to Kitten, Spencer Cenname called his mother and told her what Kitten had said. Christina Cenname denied having told Kitten that Spencer Cenname should "choose his poison." Christina Cenname then explained what she had said to Kitten.

23. After speaking to his mother, Spencer Cenname called the fair housing group he had contacted earlier in the week to discuss the demands that Kitten was making. Cenname understood that the group wanted him to agree to pay six months of rent in advance to Kitten and then tape record the meeting with Kitten on October 2, 1998. As a result of his conversation with the fair housing group, Cenname called Kitten a third time on September 30, 1998. Cenname told Kitten that he would pay Kitten six months of rent in advance.

24. Sometime on September 30, 1998, Kitten received the written credit report about Cenname. The report did not show a bad credit history, it was just a short one. Kitten never mentioned to Cenname or Cenname's mother that his concern with respect to renting to Cenname was due to Cenname's lack of credit history.

25. After telling Kitten that he would pay him six months of rent in advance, Cenname discussed the situation with a family attorney from Ohio and the treatment staff at the hospital. Cenname decided that he would not go through with the plan to pretend to pay six months of rent in advance and tape record his conversation with Kitten on October 2, 1998.

26. On Thursday, October 1, 1998, Cenname called Kitten and told Kitten that Cenname would not pay Kitten six months of rent in advance. Cenname told Kitten that he had decided to hold Kitten to the original agreement. Kitten told Cenname not to show up Friday if Cenname was not going to pay the six months of rent in advance. Cenname told Kitten that if the deal requires Cenname to pay six months of rent in advance, then "the deal [was] off." Kitten agreed that "the deal [was] off." Cenname asked Kitten to return his money. Kitten told Cenname that he would not send Cenname's money back because he was going to use the money for the unit's rent for the month of October. Kitten raised his voice to Cenname and told Cenname that Kitten did not have to return the money because Cenname signed the lease. Then the telephone conversation ended. Cenname called Kitten later and left a message in which he asked for his money back again. Kitten never returned Cenname's money. As a result, Cenname lost $1,925.00.

27. Kitten did not usually ask other potential renters for six months of rent in advance or for permission to speak to their doctors before agreeing to rent to them.

28. Kitten exacted different and more stringent price, terms and conditions on Cenname for leasing the apartment at 317 South Brookfield Road because Kitten regarded Cenname's eating disorder to be a physical and mental impairment that would prevent Cenname from living on his own, outside of a hospital. Kitten also feared that Cenname's eating disorder would cause Cenname to suffer from depression and lead to Cenname attempting to commit suicide.

29. During the period from September 27, 1998 through October 1, 1998, Cenname became increasingly upset as a result of Kitten's demands to change the terms of the lease due to Cenname's eating disorder. Cenname took up valuable counseling time at the hospital with discussions of his fears and his anxiety due to Kitten's conduct, rather than receiving treatment for his eating disorder. As the week progressed, Cenname became more stressed by the situation and began to cope with the situation by binge eating and compulsively exercising.

30. Cenname had stopped smoking prior to September of 1998. However, Cenname felt increasingly stressed during the period from September 27, 1998 through October 1, 1998 because of Kitten's demands for different lease terms. During the week, Cenname began to smoke a half a pack of cigarettes at a time. Cenname was not able to stop smoking again until July of 1999. At that time, Cenname began to let go of the stress and anxiety of the situation created by Kitten and began to focus more on resolving the issue through legal process.

31. During the time that Cenname was hospitalized in 1998, Cenname had managed to overcome his problems with being unable to sleep. Cenname was sleeping well for the

first time in 10 years prior to September 27, 1998. During the period from September 27, 1998 through October 1, 1998, Cenname became extremely upset about Kitten's attempts to change the lease terms because of Cenname's eating disorder. As Cenname became more upset, Cenname began to again have difficulty sleeping. Cenname continued to have problems with sleeping until he began to slowly overcome his sleeping problems in December of 1998.

32. During the period from September 27, 1998 through October 1, 1998, Cenname experienced more headaches than normal. Cenname believed that the headaches were due to the stress of dealing with Kitten's demands to change the lease terms because of Cenname's eating disorder.

33. As a result of Kitten's demands to change the terms of the lease, Cenname was unable to move out of the hospital on October 2, 1998. Cenname was unable to find another apartment to rent until October 11, 1998. Cenname was unable to move into the apartment that he found until October 22, 1998. Cenname had to live in the hospital for 20 days beyond October 1, 1998. Cenname had to pay $400.00 per day for every day that he remained in the hospital. Cenname had to pay $8,000.00 in additional hospital costs because he was unable to move into the rental unit at 317 South Brookfield Road on October 2, 1998 without complying with Kitten's more stringent lease terms.

34. On October 22, 1998, Cenname moved into an apartment in Milwaukee, Wisconsin on Prospect Avenue. The apartment that Cenname moved into eventually was about half the size of the apartment at 317 South Brookfield Road. The unit on Prospect Avenue also did not have a fireplace. Cenname signed a year lease for the apartment on Prospect Avenue and had to pay $1,150.00 per month. Cenname had to pay $225.00 more per month for the apartment on Prospect Avenue than he would have had to pay for the apartment at 317 South Brookfield Road. Cenname had to pay $2,700.00 more in rent over a one-year period than he would have had to pay if he had been able to live in the unit at 317 South Brookfield Road.

35. On approximately September 28 or 29, 1998, Cenname had arranged to have telephone service at 317 South Brookfield Road started on October 2, 1998. Cenname incurred a fee of $48.67 for disconnecting the telephone service after he was unable to move into the rental unit on Brookfield Road.

36. During the period from September 27, 1998 through October 1, 1998, Cenname consulted with an attorney to obtain advice about the rental situation with Kitten. Cenname was charged $200.00 in legal fees for legal services provided during the period.

37. After Cenname stopped receiving inpatient treatment on October 22, 1998, Cenname continued to receive medical treatment for his eating disorder on an outpatient basis. Cenname was continuing to receive outpatient treatment for his eating disorder as of the date of hearing in this matter on September 9, 1999. As of the date of the hearing in this matter, Cenname was not working because he did not believe that he could handle the stress of a job and still cope with his eating disorder symptoms.

Based on the Findings of Fact made above, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Respondent is a person within the meaning of the WOHA.

2. The Complainant is a person with a disability within the meaning of the WOHA.

3. The Complainant has proven by a preponderance of the evidence that the Respondent violated the WOHA by exacting different or more stringent price, terms or conditions for the rental of a housing unit because of a disability.

Based on the Findings of Fact and Conclusions of Law made above, the Administrative Law Judge issues the following:

ORDER

1. That the Respondent cease and desist from discriminating against the Complainant on the basis of a disability.

2. That the Respondent pay to the Complainant the sum of $12,673.67 for out-of-pocket expenses that the Complainant incurred as a result of the Respondent's discriminatory actions. The amount includes $8,000.00 incurred by the Complainant due to being hospitalized an additional 20 days. The amount also includes $2,700.00 which is the additional rent the Complainant had to pay over a one year period for the apartment he rented on Prospect Avenue as compared to the lower rent he would have paid if he had rented from the Respondent. The amount also includes $48.67 for the cost of having to disconnect the telephone service that the Complainant had ordered for the rental unit owned by the Respondent. The amount also includes $1,925.00 which is the amount the Complainant paid to the Respondent for a security deposit and one month of advance rent.

3. That the Respondent will pay the Complainant the sum of $10,000.00 for emotional distress caused by the Respondent's discriminatory conduct towards the Complainant.

4. That the Respondent shall pay to the Complainant interest at the rate of 12% on all monetary amounts due to the Complainant under this Order.

5. That the Respondent shall forfeit the amount of $5,000.00 to the State of Wisconsin. The forfeiture shall be made payable to the Wisconsin State Treasurer and should be sent to Robin Barkenhagen, Compliance Officer, Equal Rights Division, P.O. Box 8928, Madison, Wisconsin 53708, within 30 days of the date of this order.

6. The Respondent shall pay the reasonable attorney's fees and costs incurred by the Complainant in this matter. To date, the reasonable attorney's fees and costs incurred in this matter are $4,738.00. The reasonable attorney's fees and costs shall be paid by check made payable jointly to Spencer Scott Cenname and Attorney Sandra G. Radtke.

7. That within 30 days after the date that this Order becomes final, the Respondent shall submit a compliance report to the Equal Rights Division of the Wisconsin Department of Workforce Development detailing the actions it has taken to comply with this Order. The compliance report shall be directed to Robin Barkenhagen, Compliance Officer, Equal Rights Division, P.O. Box 8928, Madison, Wisconsin 53708.

Dated at Milwaukee, Wisconsin FEB 22 2000

Alice E. DeLaO
Administrative Law Judge

MEMORANDUM OPINION

Credibility

After reviewing the evidence in this matter, the Administrative Law Judge has determined that the Respondent's evidence is less credible than the evidence presented by the Complainant. While the Respondent insists that his reasons for demanding that the Complainant pay additional rent in advance was due to economic circumstances, the Respondent's actions during the course of the events belies that explanation. The Respondent was clearly aware of the Complainant's financial situation at the time that the lease was completed. The Respondent did not indicate at any time that he was concerned about the lack of financial information or the quality of the financial information provided. Moreover, when asked "where do we stand", the Respondent informed the Complainant that the apartment was the Complainant's.

Although the Respondent claims that the credit check done on the Complainant showed an inadequate credit history, the Respondent never raised this as an issue with the Complainant at any time. The sole reason provided by the Respondent to the Complainant for needing an additional six months of advance rent was due to the Respondent's fear that the Complainant would have a relapse of his eating disorder problem and would require hospitalization. The Respondent's fears and concerns about the Complainant's eating disorder were also shown by his desire to speak to the Complainant's doctor. The Respondent's concern about the Complainant's eating disorder was further shown by the Respondent's questioning of the Complainant and his mother as to whether the Complainant would attempt to commit suicide while residing in the apartment.

While the Respondent now attempts to characterize his actions as being those of someone who was concerned about the Complainant's financial ability to pay, the Respondent's actions do not support this characterization. Additionally, the Administrative Law Judge notes that the Respondent was extremely evasive and unwilling to provide direct answers to questions during his examination by the Complainant's attorney. After fully considering the information provided by both parties, the Administrative Law Judge determines that the Respondent's reason for attempting to speak to the Complainant's doctor and for requiring the Complainant to pay an additional six months of advance rent was due to the Complainant's eating disorder.

Disability

The Respondent argues that the Complainant has failed to meet the definition of a disability as provided under sec. 106.04(1m)(g), Stats. That section provides as follows:

> "Disability" means a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment or being regarded as having such an impairment. "Disability" does not include the current illegal use of a controlled substance, as defined in s. 961.01(4), or controlled substance analog, as defined in s. 961.01(4n), unless the individual is participating in a supervised drug rehabilitation program.

The Administrative Law Judge is not convinced that the Complainant has established that his eating disorder was an actual physical or mental impairment that substantially limited one or more major life activities. While eating is a major life activity, the Administrative Law Judge determines that the lack of medical evidence regarding the exact nature, extent, severity and long-term prognosis of the Complainant's eating disorder makes it difficult to determine if the Complainant's eating disorder qualifies as an actual disability within the meaning of the Wisconsin Open Housing Act (WOHA). The Administrative Law Judge is particularly concerned about the Complainant's failure to provide medical evidence regarding whether the Complainant's eating disorder is a permanent impairment of either his physical or mental capabilities. Without this information, the Administrative Law Judge determines that the Complainant cannot establish that he has an actual disability. This lack of medical information also prevents the Administrative Law Judge from finding that the Complainant has a record of having such an impairment.

However, the Administrative Law Judge determines that there is sufficient evidence to establish that the Respondent regarded the Complainant's eating disorder as being a physical or mental impairment that substantially limited the Complainant's ability to enjoy major life functions. Specifically, the Respondent clearly showed by his actions and his statements that he believed that the Complainant's eating disorder would cause the Complainant to be unable to take care of himself and live on his own. Specifically, the Respondent believed that the Complainant would have a relapse of his eating disorder symptoms when living alone and would require continuing hospitalization. Alternatively, the Respondent hypothesized that the Complainant's eating disorder would cause the Complainant to suffer from serious depression and attempt to commit suicide. Given the Respondent's belief that the Complainant's eating disorder would prevent him from being able to live on his own and take care of himself without further hospitalization or attempts on his life, the Administrative Law Judge determines that the Respondent regarded the Complainant as having a disability within the meaning of the WOHA.

Remedies

The Respondent makes many arguments regarding why the Complainant is not entitled to a remedy in this matter. Primarily, the Respondent's arguments go to his basic contention that he did not violate the WOHA by imposing different or more stringent rental terms and conditions on the Complainant because of a disability. Since the Administrative Law Judge has rejected the Respondent's argument that he did not discriminate against the Complainant because of a disability, the Administrative Law Judge will not address many of these arguments. However, the Administrative Law Judge will address some of the arguments made by the Respondent.

The Respondent argues that the Complainant is not entitled to be paid the difference between the cost of renting an apartment on Prospect Avenue and the cost the Complainant would have incurred if he had rented an apartment from the Respondent. The Respondent bases this argument on the alleged "fact" that there were many similar apartments located in the area where the Respondent's rental unit was located. This "fact" does not appear in the record anywhere and will not be considered. The sole testimony provided on this issue was that the Complainant was unfamiliar with the Milwaukee area since he had only recently moved to the area. The Complainant stated that the only apartment he was able to find was the apartment on Prospect Avenue. The Respondent has provided no evidence to rebut this testimony. Therefore, the Complainant's testimony will be credited and used in this matter.

The Respondent attacks the Complainant's testimony regarding the emotional distress that he suffered after the Respondent began to insist on different terms for the lease due to the Complainant's eating disorder. The Respondent claims that these statements are unsubstantiated by any corroborative evidence in the record. While the Respondent's statement is true, the argument does not make the Complainant's testimony unbelievable. The Complainant presented this evidence of his emotional distress without any rebuttal evidence from the Respondent to dispute the accuracy of the Complainant's statements. Given that there has been no effective rebuttal of the Complainant's statements regarding the mental anguish that he suffered and the symptoms that resulted from the Respondent's conduct towards him, the Administrative Law Judge credits the Complainant's testimony.

The Administrative Law Judge not only credits the Complainant's testimony regarding the mental anguish that he suffered, the Administrative Law Judge finds that the emotional distress inflicted on the Complainant by the Respondent to be egregious. During the days that the Respondent unfairly applied pressure to force the Complainant to agree to more stringent lease terms than those imposed on others, the Complainant's physical and mental health were adversely affected by the Respondent's conduct. During the period, the Complainant experienced increased headaches, began smoking, and had trouble sleeping. The stress of the situation also exacerbated the Complainant's tendency to binge eat and compulsively exercise. The stressful situation also resulted in the Complainant using valuable counseling time at the hospital to discuss the rental demands being made by the Respondent and how the demands were adversely affecting the Complainant. At least some of the effects of the stress imposed on the Complainant by the Respondent took several months to resolve. For instance, the Complainant began smoking during the Complainant's stressful discussions with the Respondent in September of 1998. The Complainant was unable to stop smoking again until ten months later in July of 1999. Given the serious and prolonged nature of the effects of the

Respondent's conduct on the Complainant, the Administrative Law Judge finds that an award of $10,000.00 in emotional distress is appropriate.

Forfeiture

Sec. 106.04(6)(h) 3., Stats. provides that an Administrative Law Judge may assess a forfeiture against a Respondent who is a natural person in an amount not exceeding $10,000.00 for the first violation of the WOHA. Wisconsin Administrative Code sec. DWD 220.23(2) provides that an Administrative Law Judge may order a forfeiture to be paid if the Respondent's violation of the WOHA is found to have been "willful." The administrative rule does not define what the term "willful" means within the meaning of the administrative rule. However, prior case law interpreting the WOHA provides some guidance to this matter. In the case of Metropolitan Milwaukee Fair Housing Council v. Goetsch (LIRC, 12/6/91), the Labor and Industry Review Commission reviewed the intent of the WOHA and determined that the term "willful" required proof of a "knowing or reckless disregard as to whether the actions taken violated the law."

While there was no specific testimony in this matter from the Respondent as to whether he was aware of the WOHA or housing discrimination laws in general, the record shows that the Respondent had been employed as a rental housing manager in Wisconsin for 24 years as of September of 1998. The Administrative Law Judge determines that it is simply not reasonable to believe that someone who made their living full-time as a rental property manager for both his own properties, and for other people's properties, in the state of Wisconsin for 24 years would be unaware that it was illegal to discriminate against someone in connection with housing rental based on the person's disability.

Additionally, the Administrative Law Judge finds that the Respondent's testimony at the hearing clearly indicated that the Respondent was aware that it was illegal to exact different terms or conditions for renting housing units because of a disability. The thrust of the Respondent's testimony was to characterize his actions as being connected to a determination that the Complainant's economic situation was questionable and therefore provided a reason for the Respondent to exact different terms and conditions for the rental of the property. The Respondent was adamant that his reason for asking for additional rent was not related to the Complainant's medical condition. Given the Respondent's 24 years of experience as a rental manager in the state of Wisconsin and his attempts to characterize his actions as something other than being connected to the Complainant's disability, the Administrative Law Judge determines that the Respondent was fully aware that it was illegal to exact different terms from a tenant based on a tenant's disability. Therefore, the Administrative Law Judge assesses a forfeiture against the Respondent of $5,000.00.

The Administrative Law Judge determines that a forfeiture in this matter is necessary because of the egregious conduct of the Respondent. The Respondent was clearly aware that the Complainant was a vulnerable person, since the Respondent was aware that the Complainant was hospitalized and being treated for an ongoing eating disorder. From the Respondent's own sister, a nurse, the Respondent became aware that the Complainant's eating disorder could be associated with depression. The Respondent was also aware from his interrogation of the Complainant and the Complainant's mother that the Complainant had been subject to thoughts of suicide in the past. Despite being aware of the very fragile nature of the Complainant's health, the Respondent applied pressure to the Complainant to force the Complainant to pay

additional rent money when the Respondent knew that the Complainant would feel that he had to pay. It is telling that the Respondent did not request the additional six months of advance rent until the Complainant notified the Respondent that the Complainant planned to move into the apartment in less than seven days. The Respondent utilized his economic position to try to extort an additional six months of advance rent out of the Complainant without cause. When the Complainant finally refused to comply with the Respondent's demands for more money, the Respondent would not rent the apartment to the Complainant and refused to return the $1,925.00 the Complainant had already paid. Given the Respondent's blatant abuse of the Complainant and the Complainant's testimony regarding the results of that abuse, the Administrative Law Judge determines that a forfeiture of $5,000.00 is appropriate.

In assessing the amount of forfeiture, the Administrative Law Judge has considered the amounts that have already been awarded to the Complainant for out-of-pocket expenses, emotional distress, and interest. Given the monetary award to the Complainant, the Administrative Law Judge has decided not to assess the full $10,000.00 forfeiture that could be imposed. Therefore, the Administrative Law Judge has awarded a forfeiture of only $5,000.00.

AED/kkp
cc: Complainant
Respondent
Sandra G. Radtke, Attorney for Complainant
Phil Elliott, Jr., Attorney for Respondent

COMPLIANCE CHECKLIST FOR OPEN HOUSING CASES AND PUBLIC ACCOMMODATIONS AND AMUSEMENTS CASES AND POSTSECONDARY EDUCATION CASES

Note: Please return this checklist within thirty (30) days to: Robin Barkenhagen, Compliance Officer, Equal Rights Division, P.O. Box 8928, Madison, WI 53708. Also, if you need assistance with the calculations and/or other preparation of this form, please contact Robin Barkenhagen at 608-266-6860 or TDD Number 608-264-8752.

1. **MONETARY REMEDIES:** If the Respondent(s) has been ordered to pay monetary remedies of any kind to the Complainant, **please enclose a copy of the check(s) remitted to the Complainant which the Respondent asserts is in satisfaction of the award of monetary remedies.**

2. **FORFEITURES (FINES):** If the Respondent(s) has been ordered to pay a forfeiture (fine), please contact the Equal Rights Division Compliance Officer (at the telephone numbers indicated above) for information on how to make out the check **and please remit the check to the Equal Rights Division Compliance Officer for processing.**

3. **ATTORNEY FEES AND/OR COSTS:** If the Respondent(s) has been ordered to pay attorney fees and/or costs, please provide a copy of the check remitted for attorney fees and/or costs.

4. **OTHER REMEDIAL ACTIONS:** If the Respondent(s) has been ordered to do any other remedial actions (such as training, posting a notice and/or otherwise), please provide information demonstrating that the remedial actions have been complied with.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 9 WAUKESHA COUNTY

DONALD R. KITTEN,

Petitioner,

vs. Case no. 00-CV-559

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

Respondent.

MEMORANDUM DECISION

Procedural History

The Complaint, filed March 10, 1999, alleged that the Respondent violated the Wisconsin Open Housing Act (WOHA) by extracting different or more stringent price, terms or conditions for the rental of a housing unit because of a disability. An investigator for the Equal Rights Division of the Department of Workforce Development found probable cause to believe that Respondent violated the Act as alleged in the Complaint in an Initial Determination on April 29, 1999. The matter came on for a hearing on September 9, 1999 before Administrative Law Judge Alice E. DeLao. The Complainant appeared in person and by his attorney, Sandra Graf Radke and the Respondent appeared in person and by his attorney, Phil Elliot, Jr. Based on the evidence received during the hearing in this matter and the argument submitted by brief, the ALJ found for the Complainant.

Standard of Review

Wis. Stat. § 227.57 provides the applicable standard of review. The circuit court may not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. In general, a finding of fact is supported if reasonable minds could arrive at the same conclusion. Westring v. James, 71 Wis.2d 462, 238 N.W.2d 695 (1976). The circuit court reviews the ALJ's legal conclusions *de novo*.

Disputed Factual Issues

Kitten argues that the "main dispute between the parties is their respective positions over the last day or two prior to the date when [Cenname] was to take occupancy. (Complainant's Brief at 18.) Kitten argues that after Cenname refused to furnish additional rental consideration, Kitten backed off on his request and authorized Cenname to rent the apartment and Cenname refused to take occupancy.

The ALJ specifically found that "Kitten told Cenname not to show up Friday (move-in day) if Cenname was not going to pay the six months of rent in advance. Cenname told Kitten that if the deal requires Cenname to pay six months of rent in advance, then 'the deal was off.'" (ALJ fact #26).

The ALJ also made a specific determination that the evidence submitted by Kitten was less credible than that submitted by Cenname for several reasons. For example, while Kitten claims the credit check he performed showed an inadequate credit history, he never raised this issue with Cenname at any time. The sole reason Kitten cited for needing the additional six month's rent was his fear the Cenname would relapse and require hospitalization. Kitten's fears and concerns are shown by his desire to speak with Cenname's doctor, his questioning of Cenname and his question of Cenname's mother as to whether Cenname would commit suicide while residing in his

apartment. In light of the ALJ's analysis of Kitten's credibility this court can find no reason to hold that the ALJ's determination is contrary to the credible and substantial evidence.

Legal Issues

The ALJ made three Conclusions of Law. First, that Kitten is a person within of WOHA. Second, that Cenname is a person with a disability within the meaning of WOHA. Lastly, that Cenname had proven by a preponderance of the evidence that Kitten violated WOHA by exacting different or more stringent price terms or conditions for the renal of a housing unit because of a disability. Kitten does not dispute that he is a person within the definition of WOHA.

Disability

Cenname is a person with a disability within the meaning of WOHA. Wisconsin statute § 106.04(1m)(g) defines disability. "Disability means a physical or mental impairment that substantially limits one or more major life activities, a record of having such impairment or being regarded as having such an impairment." Wis.Stat.. §106.04(am)(g).

The ALJ concluded that Cenname was regarded as having an impairment because of statements by Mr. Kitten. For example, Kitten asked Cenname if he could speak with his doctor. Kitten also called Cenname's mother and asked her about Cenname's mental health. Lastly, Kitten expressed concern that Cenname would need to return to inpatient treatment in the hospital.

Contrary to Kitten's contention, Cenname need not introduce medical evidence of his disability. Under the statute, disability includes being regarded as having an impairment and the individual need not actually prove that he has an impairment in order to recover.

Credible and substantial evidence indicates the Kitten regarded Cenname to be disabled.

He feared Cenname was suicidal. Kitten asked for six months rent in advance in the event Cenname returned to the hospital. Additionally, Cenname had been treated in an inpatient setting for an eating disorder and was not working. The ALJ's conclusion that Kitten treated Cenname as a disabled person is reasonable and supported by the evidence.

Discrimination

In order for Cenname to prevail he must prove that Kitten exacted different or more stringent price, terms or conditions for the sale, lease or financing of rental of housing. Substantial evidence indicates that Kitten exacted different rental terms from Cenname.

There is not dispute that Kitten asked Cenname to pay six months of rent up front. The dispute is whether payment of the additional rent was or was not a condition for Cenname to move in to the apartment. Cenname testified that Kitten would not permit him to occupy the apartment without tendering a check for six months rent. Kitten argues that he at first made the demand but backed off the demand. The ALJ found Cenname's testimony to be more credible than Kitten's testimony and found in favor of Cenname. This court agrees that the credible and substantial evidence indicates that Kitten did not lessen his demand for rent because of Kitten's concerns about Cenname This court believes that Kitten's inquiries into Cenname's mental health indicate that his real concerns were over a perceived disability, not over Cenname's ability to pay the rent as Kitten argues.

Fairness Doctrine

The ALJ ordered Kitten to pay $12,673.67 for out-of-pocket expenses. Those expenses included $8,000 for twenty additional days of hospitalization at $400 per day, $2700 in additional rent that Cenname had to pay for the other apartment, $48.67 for disconnecting telephone service,

$200 attorney's fees for the period 9/27/98 to 10/01/98 and the $1,925 security deposit. The ALJ also ordered Kitten to pay $10,000 for emotional distress and the state of Wisconsin a $5,000 forfeiture. The ALJ also awarded $4,738 in attorney's fees.

The test used to judge if the doctrine has been violated is whether a disinterested person, being apprised of the totality of a board member's personal interest in a matter being acted upon, would be reasonably justified in thinking partiality may exist. Guthrie v. WERC, 107 Wis.2d 306 320 N.W.2d 306 (1982). The court is satisfied that no unfairness exist in the ALJ's decision and order given the egregiousness of the Kitten's actions in this case.

Kitten makes much of the fact that some of Cenname's testimony is uncorroborated but fails to note that his testimony is also unrebutted. Therefore, Cenname's testimony will be credited and used in this matter.

The ALJ not only credited Cenname's testimony but found the emotional distress be egregious. During the days that Kitten attempted to force Cenname to agree to more stringent lease terms Cenname had trouble sleeping, started smoking, had headaches, and exacerbated his tendency to binge eat and exercise compulsively.

Conclusion

The ALJ's decision is supported by credible evidence and is hereby affirmed.

Hon. Donald J. Hassin Jr.
Circuit Court Branch 9
Waukesha County

20 NOV 2000

COURT OF APPEALS
DECISION
DATED AND FILED

August 8, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-3562

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

DONALD R. KITTEN,

PLAINTIFF-APPELLANT,

V.

STATE OF WISCONSIN
DEPARTMENT OF WORKFORCE DEVELOPMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Waukesha County: DONALD J. HASSIN, Judge. *Affirmed.*

Before Brown, Anderson and Snyder, JJ.

¶1 ANDERSON, J. Donald R. Kitten appeals from a circuit court order affirming a hearing examiner's decision that he unlawfully discriminated

against Spencer S. Cenname contrary to WIS. STAT. § 106.04 (1997-98),[1] the Wisconsin Open Housing Act (WOHA). The hearing examiner[2] found, and the circuit court agreed, that Kitten had sought to exact from Cenname a different or more stringent price, terms or conditions for the rental of a housing unit because of a disability within the meaning of the WOHA. We agree. Therefore, we affirm.

Relevant Law

¶2 Wisconsin's Open Housing Act provides in relevant part:

> It is unlawful for any person to discriminate:
>
> (a) By refusing to sell, rent, finance or contract to construct housing or by refusing to negotiate or discuss the terms thereof.
>
> (b) By refusing to remit inspection or exacting different or more stringent price, terms or conditions for the sale, lease, financing or rental of housing.

WIS. STAT. § 106.04(2). Wisconsin law defines "disability" and "discriminate" as follows:

> (g) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment or being regarded as having such an impairment ....
>
> (h) "Discriminate" means to ... treat a person ... unequally in a manner described in sub. (2) ... because of ... disability ....

SECTION 106.04(1m). WISCONSIN STAT. § 100.264(1)(c) defines "major life activity" as "self-care, walking, seeing, hearing, speaking, breathing, learning, performing manual tasks or being able to be gainfully employed."

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[1] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

[2] For clarity, we note that Wisconsin refers to persons who preside over administrative proceedings as hearing examiners, not administrative law judges. *See* WIS. STAT. § 111.39.

Facts

¶3 The following are the findings of fact made by the Wisconsin Department of Workforce Development (DWD) hearing examiner. On September 8, 1998, Cenname called Kitten to inquire about an apartment located at 317 South Brookfield Road that Kitten had advertised for rent. During the conversation, Kitten told Cenname that he must have a pretty good job to be able to pay $925 per month for rent. Cenname told Kitten that he in fact was not working, but he did have a financial statement and a letter from his banker guaranteeing his income and explaining his money situation. The two made arrangements to meet on September 9, 1998. Kitten told Cenname to bring his checkbook because the apartments "go fast" and Cenname might want to give Kitten a check right away.

¶4 On September 9, 1998, Cenname met Kitten at the apartment. After viewing the apartment, Cenname told Kitten that he wanted to rent it. Cenname and Kitten then sat down to discuss Cenname's financial situation. Cenname gave Kitten a photocopy of an account statement from Merrill Lynch that showed that Cenname had $40,446 in Merrill Lynch accounts as of July 31, 1998. Cenname provided Kitten with a letter from his father (also his financial advisor), August Cenname, written on Merrill Lynch stationery that explained Cenname's current account balances and that he received $3000 per month after taxes. The letter also explained that Cenname's account balances had steadily increased over the thirteen years that he had been a customer of Merrill Lynch and that he had always promptly paid his Visa account. Cenname showed Kitten a handwritten document that had bank account numbers, names and telephone numbers of people who could be contacted to provide personal and financial references for him. Based on the information provided by Cenname, Kitten began to write up a lease agreement.

¶5 While Kitten was writing up the lease agreement, he asked Cenname where he lived. Cenname did not want to tell Kitten that he was currently living at Rogers Memorial Hospital, where he was being treated for an eating disorder, so he told Kitten that he was living with friends. Kitten continued to ask Cenname about where he was living; eventually Cenname felt compelled to admit that he was living at Rogers Memorial Hospital and that he was being treated for an eating disorder. Kitten told Cenname that he knew from his "caller ID" device that Cenname's first call to him had been from the hospital. Kitten told Cenname that Cenname looked like he did not eat enough. Cenname and Kitten then had a short discussion regarding Cenname's eating disorder.

¶6 As Kitten went through the lease with Cenname, he pointed out that Cenname would be required to pay Kitten a deposit of one month of rent in advance and $1000 for a security deposit. Kitten explained to Cenname that any money paid to Kitten on September 9, 1998, would not be refunded unless Kitten denied Cenname occupancy. Cenname signed the completed lease form and gave Kitten a check for $1925 to cover the first month's rent and the security deposit. The lease was for one year and began October 1, 1998. Cenname understood that Kitten planned to have a credit check run on him before Kitten would sign the lease. However, when Cenname asked Kitten about the requirement, Kitten indicated that he did not think that it would be a problem. Before Cenname left, he asked Kitten "where do we stand," and Kitten said the apartment was Cenname's and directed Cenname to call him a week before he planned to move into the apartment. Cenname asked for a copy of the lease that he had signed. Kitten told Cenname that he would mail him a copy.

¶7 On September 11, 1998, Kitten received a verbal credit report for Cenname. The report revealed that Cenname's credit history was brief, but good.

On September 14, 1998, Kitten cashed Cenname's check for the first month's rent and the security deposit. Kitten did not attempt to contact Cenname during the period from September 9, 1998, through September 26, 1998. On September 27, 1998, Cenname called Kitten to let him know that he planned to move into the apartment on October 2, 1998. Cenname asked about getting into the apartment and also asked why Kitten had not sent him a copy of the lease. Kitten told Cenname that he was concerned that Cenname might go back into the hospital and that Kitten would not be able to get his rent money. Kitten told Cenname that he would "feel better" if Cenname paid Kitten six months' rent in advance. Kitten did not think that paying the money should be a problem for Cenname since Cenname had over $40,000 in his accounts at Merrill Lynch. Cenname was very nervous and confused by Kitten's request for six months of rent in advance. Cenname agreed to pay six months' rent in advance because he was afraid that if he did not agree to Kitten's request, Kitten would not rent to him. Cenname asked Kitten to fax a copy of the lease to him at Rogers Memorial Hospital. Kitten then made arrangements to meet Cenname at the apartment on October 2, 1998.

¶8 On September 27, 1998, Cenname received a message that he should call Kitten. Cenname spoke with Kitten again by telephone on September 28, 1998. In this phone conversation, Kitten arranged to change the meeting time on October 2, 1998, and then asked Cenname if he could call Cenname's doctor. This made Cenname very nervous and he believed that if he did not let Kitten speak to his doctor, Kitten would not rent the apartment to him. Cenname told Kitten that he would have his doctor call Kitten. Kitten asked Cenname to tell him the name of his doctor and Cenname complied. Cenname then told Kitten that he was uncomfortable with paying Kitten six months' rent in

advance. Kitten reiterated his concern that Cenname would have a relapse and go back into the hospital. Kitten also stated that he was concerned that Cenname would pay the hospital first and that Kitten would not be able to get his rent money. Although Cenname did not directly state to Kitten that he would not pay an additional six months' rent in advance, Cenname made it clear to Kitten that he was not happy with the request for an additional six months' rent. Cenname then reiterated his request that a copy of the lease be faxed to him at the hospital.

¶9 On September 29, 1998, Kitten called Cenname's doctor and left a telephone message for the doctor to return his call so that Kitten could speak to him about Cenname. The doctor's office manager heard Kitten's telephone message and contacted Cenname to see if he wanted to give permission to the doctor to discuss his medical condition with Kitten. Cenname was surprised and upset to find out that Kitten had called his doctor's office without Cenname's permission or knowledge. Cenname refused to grant the doctor permission to discuss his medical condition with Kitten. As a result of Cenname's decision, no one from the doctor's office contacted Kitten.

¶10 On September 29, 1998, after Cenname spoke to the office manager, he called Kitten. Cenname told Kitten that it was inappropriate for him to call Cenname's doctor and that Cenname was upset about his actions. Kitten insisted that he needed to speak to Cenname's doctor and that he needed the six months' rent paid in advance. Cenname again told Kitten that Kitten's actions were inappropriate. Cenname ended the conversation by again asking Kitten to fax him a copy of the lease to Rogers Memorial Hospital.

¶11 After this conversation, Kitten faxed a copy of the lease that Cenname had signed on September 9, 1998. The lease agreement still did not

have Kitten's signature on it. On September 30, 1998, Cenname called Kitten and told him that he would not pay six months' rent in advance and that Kitten did not have Cenname's permission to speak to his doctor. Kitten insisted that it was his right to inquire about Cenname's medical condition because Kitten had concerns and needed to protect the tenants in the other units. Kitten said that his sister was a nurse and that she told Kitten that Cenname's condition involved some depression. Kitten then described a hypothetical situation in which he came to the apartment complex and found Cenname in his car with the garage door closed and the exhaust fumes running from his car. Kitten told Cenname that such a situation would damage the rental unit. From listening to Kitten's hypothetical, Cenname determined that Kitten was trying to ask if he was suicidal. Cenname told Kitten that he was not suicidal. Cenname asked Kitten if speaking to his doctor was a condition of renting the apartment. Kitten said, "No, not really."

¶12 Cenname told Kitten that it was unreasonable to ask for six months' rent in advance. Cenname asked Kitten why he had not signed the lease. Kitten told Cenname that since Cenname had signed the lease, he had to pay the rent. Kitten then said that since Kitten had not signed the lease, he was not obliged to let Cenname rent the apartment. Cenname insisted that since Kitten had cashed his check that Kitten had to abide by the original terms of the lease. Kitten continued to insist that Cenname pay him six months' rent in advance. Cenname told Kitten that if he wanted more financial information, he should talk to Cenname's financial advisor. Kitten laughed and said, "That's your father." Cenname said, "That's right," and gave Kitten his parents' home telephone number in Columbus, Ohio, so Kitten could contact his father.

¶13 On September 30, 1998, Kitten called Cenname's parents' home. Kitten expressed his concerns to Cenname's mother because his father was not

home. Kitten said that in his rental units the garages were attached and that if something happened the gas would enter the other units. Cenname's mother asked Kitten if he was concerned that Cenname would attempt to commit suicide. Kitten responded, "Yes." Cenname's mother told Kitten that suicide might have been an issue for Cenname at one time, but that it no longer was an issue. Kitten asked Cenname's mother if she and her husband would co-sign the lease in case there was a need for Cenname to return to the hospital. She assured Kitten that Cenname had a guaranteed income of $36,000 per year after taxes; nonetheless, she agreed to co-sign, telling Kitten that he had to let her son know.

¶14 On September 30, 1998, Cenname again called Kitten, at which time Kitten told Cenname that he had spoken to Cenname's mother because his father was not available. Kitten quoted Cenname's mother as having said that her son should "choose his poison" between paying six months' rent in advance or having his parents co-sign the lease. Kitten asked Cenname which choice he was going to make. Cenname told Kitten that he needed time to think about it.

¶15 Afterwards, Cenname called his mother, who denied having told Kitten that Cenname should "choose his poison." After speaking to his mother, Cenname called the fair housing office that he had contacted earlier in the week. From his conversation with the fair housing office, Cenname understood that they wanted him to agree to pay six months' rent in advance to Kitten and to tape record the meeting scheduled with Kitten on October 2, 1998. As a result of his conversation with the fair housing group, Cenname called Kitten a third time on September 30, 1998, and told Kitten that he would pay the six months' rent in advance.

¶16 After telling Kitten this, Cenname discussed the situation with a family attorney and with the treatment staff at Rogers Memorial Hospital. Cenname then decided that he would not go through with the fair housing group's suggestion. Instead, on October 1, 1998, Cenname called Kitten and told him that he would not pay six months' rent in advance, and conversely, he had decided to hold Kitten to the original agreement. Kitten told Cenname not to show up on Friday for the planned meeting if he was not going to pay the six months' rent in advance. Cenname told Kitten that if the deal required him to pay six months' rent in advance, "the deal [was] off." Kitten agreed that "the deal [was] off." Cenname asked Kitten to return his money. Kitten told Cenname that he would not send his money back because he planned to use the money for the unit's rent for the month of October. Kitten raised his voice to Cenname and told him that he did not have to return the money because Cenname signed the lease. Cenname did not get his money back, in addition, Cenname incurred a variety of costs related to this situation.[3]

¶17 Other relevant findings made by the hearing examiner were that on September 30, 1998, Kitten received the written credit report about Cenname. The report was short, but did not show a bad credit history. Notably, Kitten never mentioned to Cenname or Cenname's mother that Cenname's brief credit history concerned him. Kitten did not usually ask other potential renters for six months' rent in advance or for permission to speak to their doctors before agreeing to rent to them.

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[3] Cenname incurred several costs as a result of this situation, among them: $8000 in additional hospital costs, $2700 more in rent over a one-year period than he would have had to pay if he had been able to live in Kitten's unit, $48.67 for disconnection of the phone service he had previously arranged, and $200 in legal fees.

Standard of Review

¶18 We begin with a discussion of the appropriate standard of review. A hearing examiner's factual findings will be upheld if supported by substantial evidence. WIS. STAT. § 227.57(6). Kitten contends that there is insufficient evidence to support the hearing examiner's findings of discrimination. Kitten claims that Cenname's condition does not rise to the level of a disability under the WOHA and, therefore, Kitten could not have discriminated against him within the meaning of the WOHA.

¶19 Claims of insufficiency of the evidence are reviewed under the substantial evidence test because they involve the hearing examiner's determination of contested facts. *See* ***Robertson Transp. Co. v. PSC***, 39 Wis. 2d 653, 658-59, 159 N.W.2d 636 (1968). When the sufficiency of the evidence is challenged, we are limited to the question of whether there is substantial evidence to support the hearing examiner's decision. ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 585-86, 326 N.W.2d 768 (1982). The hearing examiner has leeway in determining and drawing inferences from conflicting evidentiary facts. ***Milwaukee County v. DILHR***, 48 Wis. 2d 392, 399, 180 N.W.2d 513 (1970). We must affirm the findings of fact made by the hearing examiner if they are supported by substantial evidence in the record. ***Muskego-Norway Consol. Schs. Joint Sch. Dist. No. 9 v. Wis. Employment Relations Bd.***, 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967). Substantial evidence is the quantity and quality of evidence which a reasonable person could accept as adequate to support a conclusion. ***State ex rel. Eckmann v. DHSS***, 114 Wis. 2d 35, 43, 337 N.W.2d 840 (Ct. App. 1983). Where there are two conflicting views of the evidence, each of which may be sustained by substantial evidence, it is for the hearing examiner to determine which view of the evidence it wishes to accept. ***Robertson Transp.***

Co., 39 Wis. 2d at 658. If more than one reasonable inference can be drawn from the facts, the drawing of that inference is still a finding of fact and conclusive on review. ***Sauerwein v. DILHR***, 82 Wis. 2d 294, 300, 262 N.W.2d 126 (1978).

¶20 Further, it is well established that it is the function of the hearing examiner, not the reviewing court, to determine the credibility of witnesses and the weight of the evidence. ***Eastex Packaging Co. v. DILHR***, 89 Wis. 2d 739, 745, 279 N.W.2d 248 (1979). We adhere to the hearing examiner's credibility determination because the hearing examiner is in the best position to assess the witnesses' demeanor and to weigh any potential bias or interest the witnesses might have in the outcome. WIS. STAT. § 227.45(1) (an administrative hearing examiner is to apply "[b]asic principles of relevancy, materiality and probative force"). Indeed, the level of deference is such that the hearing examiner's findings must be upheld even if they are against the great weight and clear preponderance of the evidence. ***L & H Wrecking Co. v. LIRC***, 114 Wis. 2d 504, 508, 339 N.W.2d 344 (Ct. App. 1983).

¶21 Finally, we acknowledge that there are contested facts; however, because our review is based on the substantial evidence test, we need only review evidence that would support the hearing examiner's determination. ***Abbyland Processing v. LIRC***, 206 Wis. 2d 309, 318, 557 N.W.2d 419 (1996). Thus, despite the evidence introduced by Kitten that could have permitted contrary findings of fact, if a reasonable fact finder could have reached the conclusions reached by the hearing examiner, we must affirm such findings.

¶22 Once the facts are established, however, the determination of whether those facts fulfill the statutory standard is a legal conclusion. ***Keeler v. LIRC***, 154 Wis. 2d 626, 632, 453 N.W.2d 902 (Ct. App. 1990). Therefore, we

will review the hearing examiner's determination that Kitten violated the WOHA as a conclusion of law. Although we are not bound by the hearing examiner's conclusions of law in the same manner as by its factual findings, we may nonetheless defer to the hearing examiner's legal conclusion. ***West Bend Educ. Ass'n v. WERC***, 121 Wis. 2d 1, 11-12, 357 N.W.2d 534 (1984). We generally apply three levels of deference to conclusions of law and statutory interpretation in agency decisions. ***Jicha v. DILHR***, 169 Wis. 2d 284, 290, 485 N.W.2d 256 (1992). First, if the administrative agency's experience, technical competence, and specialized knowledge aid the agency in its interpretation and application of the statute, the agency determination is entitled to "great weight." ***Id.*** at 290-91. The second level of review provides that if the agency decision is "very nearly" one of first impression, it is entitled to "due weight" or "great bearing." ***Id.*** at 291. The lowest level of review, the de novo standard, is applied where it is clear from the lack of agency precedent that the case is one of first impression for the agency and the agency lacks special expertise or experience in determining the question presented. ***Id.***

Analysis

¶23 After our independent review of the record, we hold that there is substantial evidence to support the hearing examiner's findings of fact. The hearing examiner determined, and we agree, that Kitten's evidence was less credible than Cenname's. Kitten insists that his reason for demanding that Cenname pay six months' rent in advance was due to economic circumstances. However, Kitten's actions during the course of the events belie his explanation. Kitten was aware of Cenname's financial situation at the time that the lease was completed. Kitten did not indicate at any time that he was concerned about the lack of financial information or the quality of the financial information.

Moreover, when Cenname asked "where do we stand," Kitten informed him that the apartment was his.

¶24 Although Kitten claims that the credit check on Cenname showed an inadequate credit history, Kitten never raised this as an issue with Cenname. The only reason Kitten provided Cenname for needing an additional six months' advance rent was Kitten's fear that Cenname would have a relapse of his eating disorder and would require hospitalization. Kitten's fears and concerns about Cenname's eating disorder were also shown by his desire to speak to Cenname's doctor. Kitten also demonstrated his concerns about Cenname's eating disorder in his questioning of Cenname and his mother as to whether Cenname might attempt to commit suicide while residing in the apartment.

¶25 While Kitten now attempts to characterize his actions as being concerned about Cenname's financial ability to pay, Kitten's actions do not support this characterization. Additionally, the hearing examiner noted that Kitten was extremely evasive and unwilling to provide direct answers to questions during his examination by Cenname's attorney. The record, including the hearing examiner's observations of credibility, leads us to determine that Kitten's reason for attempting to speak to Cenname's doctor and for requiring Cenname to pay an additional six months' advance rent was due to Cenname's eating disorder.

¶26 Kitten argues that even if he was concerned with Cenname's eating disorder, there can be no finding of discrimination because Cenname's condition does not rise to the level of a disability as described by law. In support of this argument, Kitten points to the hearing examiner's determination that Cenname failed to establish a legal disability. We defer to this finding, but agree with the hearing examiner that there is sufficient evidence to establish that Kitten regarded

Cenname's eating disorder as being a physical or mental impairment that substantially limited Cenname's ability to enjoy major life functions. Specifically, Kitten showed by his actions and his statements that he believed that Cenname's eating disorder would cause him to be unable to take care of himself and live on his own. Kitten believed that Cenname might have a relapse of his eating disorder symptoms when living alone and would require continuing hospitalization. Alternatively, Kitten hypothesized aloud to Cenname that Cenname's eating disorder could cause him to suffer from depression and lead to an attempt to commit suicide. Given Kitten's belief that Cenname's eating disorder would prevent him from being able to live on his own and take care of himself without further hospitalization or attempts on his life, we agree with the hearing examiner's determination that Kitten regarded Cenname as having a disability within the meaning of WOHA. Thus, substantial evidence supports the hearing examiner's finding that Kitten exacted different rental terms from Cenname because of a "disability" within the meaning of the WOHA and not because of financial considerations.

¶27 Kitten argues that we ought to apply a de novo standard of review to the hearing examiner's conclusions of law and statutory interpretation of the WOHA. Cenname believes that any one of the three levels of deference could arguably be applied because the issue could be characterized as one intertwined with value or policy determinations, or as one "very nearly" or "clearly" of first impression. The correct test under Wisconsin law is whether an agency has experience in interpreting a particular statutory scheme, not whether it has ruled on the precise, or even substantially similar, facts before. ***Barron Elec. Coop. v. PSC***, 212 Wis. 2d 752, 764, 569 N.W.2d 726 (Ct. App. 1997). We conclude that under the ***Barron*** test, the proper standard of review to be given to DWD's legal

determinations in this case is great weight deference. Here, the statutory scheme being interpreted by DWD is WIS. STAT. § 106.04. DWD and its predecessors have been charged with the duty of administering that statute. Sec. 106.04(1s). Therefore, its interpretation of the statute will be given great weight in this case. However, even if we were to apply the de novo standard of review, we would reach the same result.

¶28 We have already held that there is substantial evidence to show that Kitten exacted different rental terms from Cenname because of a "disability" within the meaning of the WOHA. We now address the statutory interpretation and application issue of whether there was a "disability" within the meaning of the WOHA.

¶29 In ***School Board of Nassau County v. Arline***, 480 U.S. 273, 284 (1987) (*superceded by statute on other grounds*), the United States Supreme Court approvingly observed that Congress has acknowledged that society's accumulated myths and fears about disability are as handicapping as are the physical limitations that flow from actual impairment. In ***Arline***, a school teacher, who was fired from her job solely because of her susceptibility to tuberculosis, brought an action alleging that her dismissal violated § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794. ***Arline***, 480 U.S. at 275-76. The Supreme Court held that a school teacher afflicted with a contagious disease of tuberculosis was a handicapped individual within the meaning of the Rehabilitation Act, which prohibited a federally funded state program from discriminating against a handicapped individual solely by reason of handicap. ***Id.*** at 289. Significantly, the Supreme Court pointed out that Congress had amended the definition of a handicapped individual to include not only those who are actually physically

impaired, but also those who are *regarded as* impaired and who, as a result, are substantially limited in a major life activity. ***Id.*** at 284.

¶30 We find the Supreme Court's analysis in ***Arline*** analogous and helpful here. The term "disability" in the WOHA is defined as "a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment or *being regarded as having such an impairment*." WIS. STAT. § 106.04(1m)(g) (emphasis added). Given the Supreme Court's ***Arline*** analysis of the similar federal statute, it is no great leap for us to interpret the WOHA as protecting a person who is "regarded" by a landlord as having an impairment that substantially limits major life activities even if, in fact, he or she does not have such an impairment.

¶31 In this case, the hearing examiner determined that Cenname failed to establish that his eating disorder was an actual "physical or mental impairment that substantially limits one or more major life activities," or that he had any "record" of such an impairment within the meaning of the WOHA. The examiner determined that there was sufficient evidence, however, to establish that Kitten "regarded" Cenname's eating disorder as being a physical or mental impairment that substantially limited his ability to enjoy major life functions. Specifically, the hearing examiner found that Kitten demonstrated by his actions and statements that he believed that Cenname's eating disorder might cause him to be unable to take care of himself and to live on his own. The hearing examiner relied upon Kitten's statements reflecting his belief that Cenname would have a relapse of his eating disorder symptoms when living alone and he would require further hospitalization. The hearing examiner also relied upon Kitten's statements reflecting his belief that Cenname's eating disorder was associated with depression and that Cenname might attempt to commit suicide. We hold that Kitten violated

the WOHA by exacting a different or more stringent price, terms or conditions from Cenname for the rental of a housing unit because of a "disability" within the meaning of the WOHA.

¶32 Finally, Kitten argues that the award of damages and the out-of-pocket expenses award are not warranted. Primarily, Kitten's arguments go to his basic contention that he did not violate the WOHA by imposing different or more stringent rental terms and conditions on Cenname. Because we have rejected Kitten's contention that he did not discriminate against Cenname in violation of the WOHA, we need not address Kitten's arguments in this regard.

By the Court.—Order affirmed.

Recommended for publication in the official reports.

State of Wisconsin

In Court of Appeals

00-1232	2001 WI App 198	Renate Dahmen v. American Family
00-1564	2001 WI App 199	Jane Doe v. General Motors
00-1868	2001 WI App 200	Sandra Lynn Modrow v. Kim Jerome Modrow
00-1913	2001 WI App 201	Town of Campbell v. City of La Crosse
00-1914	2001 WI App 201	Town of Campbell v. City of La Crosse
00-1915	2001 WI App 201	Town of Campbell v. City of La Crosse
00-1916	2001 WI App 201	Town of Campbell v. City of La Crosse
00-2224	2001 WI App 202	State v. Ronald Ransdell
00-2427	2001 WI App 203	Sentry Insurance v. Rodney M. Davis
00-2467	2001 WI App 204	Lori Hofflander v. St. Catherine's Hospital
00-2532	2001 WI App 205	Brandon Apparel Group v. Pearson Properties
00-2546-CR	2001 WI App 206	State v. Daniel Rodriguez
00-2633	2001 WI App 207	Kevin Giffin v. Gary Poetzl
00-2692	2001 WI App 208	William Alexander v. City of Madison
00-2861	2001 WI App 209	J. Marshall Osborn v. Board of Regents
00-2916-CR	2001 WI App 210	State v. Glenn E. Davis
00-3073-CR	2001 WI App 211	State v. John F. Giminski
00-3134-CR	2001 WI App 212	State v. John Tomlinson
00-3162	2001 WI App 213	Heritage Credit Union v. Office of Credit Unions
00-3215	2001 WI App 214	Debra Wikel v. Wis. Dept. of Transportation
00-3390-CR	2001 WI App 215	State v. Gabriel L. Ortiz
00-3419-CR	2001 WI App 216	State v. Robert W. Wodenjak
00-3513	2001 WI App 217	Donna Walag v. DOA
00-3562	2001 WI App 218	Donald R. Kitten v. DWD
01-0065-CR	2001 WI App 219	State v. Bill Paul Marquardt
01-0116-CR	2001 WI App 220	State v. Joel O. Peterson
01-0160	2001 WI App 221	Patricia H. Roth v. LaFarge School District
01-0851-CR	2001 WI App 222	State v. James G. Langenbach
99-2306	2001 WI App 223	ABKA Limited v. DNR

Before Cane Chm., Fine, Nettesheim, Hoover, and Vergeront, JJ., Publication Committee.

The court having filed its opinion in each of the above-entitled appeals and the court having concluded pursuant to RULE 809.23 that the opinions should be published,

IT IS ORDERED that the opinion in each of the above-entitled appeals be published in the official reports.

Dated: September 26, 2001

By the Court:

Cornelia G. Clark

Cornelia G. Clark
Clerk of Court of Appeals

STATE OF WISCONSIN

IN SUPREME COURT

No. 00-3562

DONALD R. KITTTEN,

Plaintiff-Appellant-Petitioner,

v.

STATE OF WISCONSIN DEPARTMENT
OF WORKFORCE DEVELOPMENT,

Defendant-Respondent.

APPEAL FROM AN ORDER OF THE
COURT OF APPEALS, DISTRICT 2,
THAT AFFIRMED AN ORDER OF THE
CIRCUIT COURT FOR WAUKESHA COUNTY,
HONORABLE DONALD J. HASSIN, JR., PRESIDING

BRIEF OF THE DEPARTMENT OF WORKFORCE DEVELOPMENT

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STATE OF WISCONSIN

IN SUPREME COURT

No. 00-3562

DONALD R. KITTTEN,

Plaintiff-Appellant-Petitioner,

v.

STATE OF WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT,

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ISSUES PRESENTED

(1) Could the Department reasonably conclude that in order to be considered an individual with a "disability" within the meaning of the Wisconsin Open Housing Act (WOHA), it is not necessary that an individual have an actual physical or mental impairment that substantially limits one or more major life activities, but that it is sufficient if the landlord merely perceives that the individual has such an impairment?

The circuit court and the court of appeals answered in the affirmative.

(2) Could the Department reasonably conclude that an "eating disorder" that would cause an individual to be unable to take care of himself and to live on his own, because of a possible relapse requiring further hospitalization or because of associated depression which might lead him to commit suicide, a physical or mental impairment that a landlord might perceive as being a "disability" within the meaning of the WOHA?

The circuit court and the court of appeals answered in the affirmative.[1]

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[1] Petitioner Donald Kitten identifies a third issue for review: whether a landlord may exact different terms from a prospective tenant based upon economic criteria. There is no dispute, however, that a landlord may exact different terms from a prospective tenant based upon economic criteria. What Kitten really wants this court to decide is whether there is substantial evidence in the record to support the finding of the Department of Workforce Development that Kitten exacted different rental terms from Cenname because of a "disability" and not because of economic considerations (Finding No. 28) (A-Ap. 107). Ordinarily, the Supreme Court does not reexamine the determinations of the circuit court and the court of appeals that an administrative agency's findings are supported by sufficient evidence in the record. *Cf. Winkie, Inc. v. Heritage Bank*, 99 Wis. 2d 616, 621-22, 299 N.W.2d 829 (1981). In any event, substantial evidence in the record does support the Department's finding. Although Kitten testified that he wanted six months more rent up front because he was concerned about Cenname's lack of employment, his lack of a rental history, and his lack of a credit history (R. 17: 185-86, 225), Cenname testified that Kitten told him that Kitten wanted him to pay six months more rent up front because Kitten was concerned that he might have a relapse of his eating disorder, he might be hospitalized, and Kitten therefore might be unable to collect his rent payments (R. 17: 28-29, 94-95, 120-21, 129). The Department's examiner determined that Kitten's testimony was "less credible" than Cenname's testimony (A-Ap. 110). In cases such as this where "witnesses have directly contradicted each other, the impression the fact finder has of their demeanor is likely to be the decisive factor in determining who is telling the truth." *See Braun v. Industrial Comm.*, 36 Wis. 2d 48, 57, 153 N.W.2d 81 (1967). Consequently, the Department reasonably (cont).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Department of Workforce Development agrees with petitioner Donald Kitten that oral argument is unnecessary. The briefs fully present the issues on appeal and fully develop the theories and legal authorities on each side. Oral argument would be of such marginal value that it does not justify the additional expenditure of court time or costs to the litigants. *See* Wis. Stat. § 809.22(2)(b).

The court's opinion should be published, however, because it will clarify an existing rule of law, it will apply an established rule of law to a factual situation significantly different from that in published opinions, and it will decide a case of substantial and continuing public interest. *See* Wis. Stat. § 809.23(1)(b).

STATEMENT OF THE CASE

A. Nature of the case and disposition in the court of appeals.

This is an appeal from an order of the Court of Appeals, District 2, dated August 8, 2001, *see Kitten v. State Dept. of Workforce Development,* 2001 WI App 218, 624 N.W.2d 583, that affirmed an order of the circuit court for Waukesha County, the Honorable Donald J. Hassin, Jr., presiding, which was entered on November 20, 2000, and which in turn affirmed a decision of the Department of Workforce Development under the Wisconsin Open Housing Act (WOHA), *see* Wis. Stat. § 106.04(1)-

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(cont.)
could find that Kitten exacted different rental terms from Cenname because of a "disability" and not because of economic considerations.

(8)(1998-99).[2] The Department decided that Donald Kitten unlawfully discriminated against Spencer Cenname by exacting a different or more stringent price, terms or conditions for the rental of a housing unit because of a "disability" within the meaning of the WOHA. *See* Wis. Stat. § 106.04(1m)(g)-(h) and (2)(b). The Department ordered Kitten to pay Cenname $12,673.67 for out-of-pocket expenses and $10,000.00 for emotional distress, plus interest, to pay Cenname $4,738.00 for his reasonable attorney's fees and costs, and to pay the State of Wisconsin $5,000.00 as a forfeiture.

B. Procedural history of the case and statement of facts.

On September 9, 1998, Cenname told Kitten that he was interested in renting an apartment owned by Kitten (R. 17: 9-10, 99, 165-66).[3] Kitten, who had been in real estate management for twenty-five years, owned and managed 140 rental units at the time (R. 17: 163-64).

Cenname told Kitten that he was not working at the time, but he gave Kitten a letter from his father who was an executive at Merrill Lynch, and a financial statement showing that he had more than $40,000 in his bank account and an after-tax income of $3,000 per month (R. 17: 9-10, 14-17, 101-05, 166, 172-73; Exs. 1, 9-10). Cenname also gave Kitten the telephone number of a landlord from whom he had rented previously (R. 17: 229-

[2] The WOHA was renumbered from Wis. Stat. § 106.04 (1998-99) to Wis. Stat. § 106.50 (1999-2000), by 1999 Wisconsin Act 82, sec. 37. Although there were no substantive changes in the statute, the applicable statute in this case is the one in effect when the alleged discrimination occurred. *See Boynton Cab Co. v. ILHR Department*, 96 Wis. 2d 396, 401 n. 2, 291 N.W.2d 850 (1980). Consequently, all references in this brief are to Wis. Stat. § 106.04 (1998-99).

[3] References are to the transcript of testimony and to the exhibits received at the hearing on Cenname's discrimination complaint that was conducted on September 9, 1999.

30; Ex. 14). Cenname signed a lease and gave Kitten a check in the amount of $1,925.00 for a security deposit, carpet cleaning, and one month's rent (R. 17: 18, 20, 23, 99, 167; Ex. 3). Kitten told Cenname that the apartment was his and that Cenname should call him about one week before October 1, 1998, so that Kitten could give him the key (R. 17: 24-25, 108, 173, 182, 185). Cenname understood, however, that Kitten was going to check his credit (R. 17: 106, 108, 173, 182-83).

At the time, Cenname resided at Rogers Memorial Hospital where he was being treated for an eating disorder (R. 17: 11). Cenname informed Kitten that he was living at Rogers Memorial Hospital and that he was being treated for an eating disorder (R. 17: 19, 113, 115, 180-81).

Deanna Mueller, a social worker and the office manager for Dr. Thomas Holbrook, the medical director of the Eating Disorder Center at Rogers Memorial Hospital, testified that a person is admitted to the inpatient, residential treatment program when the person's eating disorder makes the person unable to function in his or her everyday activities (R. 17: 58-62, 65). Cenname was diagnosed as having bulimia nervosa (R. 17: 62-63, 66; Ex. 4). Bulimia nervosa is an eating disorder where a person either restricts food intake or consumes large amounts of food and then purges the food through vomiting, compulsive exercise, or through the use of diuretics or laxatives (R. 17: 64). The disorder results in medical, physiological and psychological effects, depending on the severity of the illness (R. 17: 65). Mueller is not a medical professional (R. 17: 74-75).

A letter authored by Dr. Holbrook and received into evidence upon the stipulation of the parties (R. 17: 57) stated that Cenname's eating disorder "disabled him for major life activities" (R. 17: 71; Ex. 4). Dr. Holbrook did not testify at the hearing in this case. Cenname continued to see Dr. Holbrook on an outpatient basis after he left the residential treatment program (R. 17: 73-74). The fact that a person leaves the residential

treatment program does not mean necessarily that the person has recovered and is able to handle the problem (R. 17: 72-73). Cenname testified that his eating disorder is a life-long disorder (R. 17: 83, 115).

On September 27, 1998, Cenname called Kitten concerning the key for the apartment and to obtain a copy of the lease (R. 17: 27, 29, 119). Cenname testified that Kitten then told him that he would "be more comfortable" with six months more rent up front before Cenname moved in (R. 17: 28, 120, 129). Cenname further testified that Kitten expressed concern about what would happen if Cenname went back into the hospital because Kitten goes out of town for six months a year and he was worried that he would not be able to get in touch with Cenname to collect his rent payments (R. 17: 28-29, 94-95, 120-21, 129). Cenname testified that he feared that Kitten would not rent to him if he refused so he told Kitten that it would be okay (R. 17: 29, 129-30). Kitten told Cenname that he would give Cenname the key and a copy of the lease when they met on October 2, 1998, and when Cenname gave him a check for six months more rent (R. 17: 29-31).

Kitten testified that he wanted the six months rent up front because he was concerned about Cenname's lack of employment, his lack of a rental history and his lack of a credit history (R. 17: 185-86, 225). Kitten testified that there had been cases in the past where he requested additional rent from prospective tenants, because of insufficient employment or income, but that such cases were rare (R. 17: 195, 209).

Kitten testified that he also was concerned about his inability to verify that Cenname had an eating disorder, *i.e.*, he did not know what he was dealing with (R. 17: 187-88). He testified that he was not concerned about someone with an eating disorder, but that he was concerned that Cenname might have a drug problem or some other problem, and that he might be a danger to himself or to the other tenants (R. 17: 188, 211-12, 216).

On September 28, 1998, Kitten called Cenname and asked if he could speak with Cenname's doctor (R. 17: 33). Cenname responded that he would have his doctor call Kitten (R. 17: 33, 132). Kitten then asked for the name of Cenname's doctor and Cenname told him the name of the doctor (R. 17: 34). Cenname testified that he told Kitten that he had re-thought the matter and that he was uncomfortable paying the additional six months rent (R. 17: 34). Cenname testified that Kitten reiterated his concern about being unable to contact Cenname if he should go back into the hospital (R. 17: 34, 36). Cenname assured Kitten that he would pay the rent regardless of whether he returned to the hospital, and further indicated that a return to the hospital was unlikely (R. 17: 34).

On September 28, 1998, Cenname was informed by his doctor's secretary that Kitten had called the doctor to inquire about Cenname's health and about whether it would be safe to rent to Cenname (R. 17: 36). Cenname then called Kitten and told him that he had consulted with his doctor and that it was not okay for him to speak with Cenname's doctor (R. 17: 36-37, 39). Cenname testified that Kitten insisted that he must speak with Cenname's doctor and that he must receive six months more rent up front in order for Cenname to take occupancy (R. 17: 37-38). Cenname testified that he told Kitten that he was not comfortable with either of those requirements (R. 17: 38).

On September 30, 1998, Cenname called Kitten and told him that he was not going to pay six months more rent up front, and that his doctor would not speak to Kitten (R. 17: 41). Cenname testified that Kitten responded that Cenname's health concerned him because he had a responsibility to protect his other tenants (R. 17: 43). Cenname testified that Kitten told him he had learned that depression is sometimes connected with eating disorders, and that Kitten was concerned that he might find Cenname in his car with the car running and exhaust fumes dispersed throughout the building (R. 17: 43, 132-33). Cenname testified that Kitten eventually asked him if he was suicidal and that Cenname responded "no" (R. 17: 43,

133). Cenname testified that Kitten then said that he was satisfied not speaking to the doctor, and that Cenname's rental of the apartment was no longer contingent upon Kitten speaking to the doctor (R. 17: 44, 95-96, 134).

Cenname testified that they then began discussing the financial issue, and that Cenname told Kitten it was unreasonable to ask for that much rent up front and that he wanted to move in under the terms that had been negotiated originally (R. 17: 45). Cenname testified that he suggested that Kitten contact his financial consultant, *i.e.*, his father (R. 17: 46, 134).

On September 30, 1998, Kitten spoke with Cenname's mother (R. 17: 142, 188). Kitten told her that he had two concerns: whether Cenname was suicidal and whether they would be willing to co-sign the lease (R. 17: 142-44, 149-50, 189). Cenname's mother responded that there was a time when suicide was an issue, but that it was no longer an issue at that time (R. 17: 144, 149). She also responded that they would be willing to co-sign the lease, but that even if they did not actually co-sign, they would help Cenname honor his agreement under the lease (R. 17: 144, 150). Cenname's mother insisted that Kitten call and inform Cenname first before Kitten sent them any lease to co-sign (R. 17: 145, 150, 189, 206).

Kitten testified that his conversation with Cenname's mother changed his opinion on Cenname's credit risk because she verified the existence of his accounts, and that she clarified that Cenname was being treated for an eating disorder and nothing more, and that his suicidal tendencies were in the past (R. 17: 205, 207). Kitten testified that his "biggest concern" was that Cenname might have a drug problem (R. 17: 208).

Later on September 30, 1998, Kitten told Cenname that he had spoken with Cenname's mother and that his mother said that he would have to "choose his poison" – to give Kitten six months more rent up front or to co-sign the lease with his father (R. 17: 49-51, 135). Kitten

testified that he indicated to Cenname that he would either have to co-sign or pay six months rent up front "in view of the financial aspects that [Kitten] had in front of [him] with no verification to deal with" (R. 17: 190). Cenname told Kitten that he would have to think about it (R. 17: 51).

Cenname then spoke with his mother who told him that Kitten had asked her questions about Cenname's mental health and whether he was suicidal (R. 17: 51). His mother also told him that she had told Kitten that they would be willing to co-sign and that if Cenname wanted to pay six months more rent up front, they would be supportive (R. 17: 52).

Cenname was working with a fair housing committee at the time (R. 17: 52, 128). On September 30, 1998, after speaking with his mother, and at the request of the fair housing committee (that wanted to wire Cenname to tape record Kitten's statements), Cenname called Kitten and told him that he would meet with him on October 2, 1998, and that he then would give him a check for six months more rent up front (R. 17: 52, 130-31, 136).

On September 30, 1998, Kitten received a credit report for Cenname (R. 17: 174-75, 197-98, 203; Ex. 13). The credit report contained only one credit account and did not indicate any bad credit, but it really did not indicate **any** credit history of any significance (R. 17: 176, 205).

On October 1, 1998, upon the advice of his family's attorney, Cenname told Kitten that he was going to hold Kitten to the initial agreement and that he was not going to give Kitten a check for additional rent the next day (R. 17: 53-54, 131, 137). Cenname testified that Kitten made it clear to him that he should not show up if he didn't have the check (R. 17: 54). Cenname testified that he responded that if renting the apartment was contingent upon his providing the check for six months more rent up front, then the deal was off (R. 17: 54).

Cenname testified that Kitten replied "okay the deals [sic] off" (R. 17: 54). Cenname testified that Kitten made it clear to him that if he did not show up with a check for six months more rent, Kitten would not permit him to have occupancy of the apartment (R. 17: 80, 93-94, 137). Cenname testified that he could have had the apartment if he head been willing to pay six months more rent up front, and that it was his decision not to take the apartment under those conditions (R. 17: 94).

Kitten testified, to the contrary, that when Cenname informed him that he would not pay six months more rent up front and he would not have a co-signer on the lease, Kitten told him that the apartment was his, that the keys were in the apartment, and that the door was open (R. 17: 191-94).[4] Kitten further testified that he expected Cenname to move in and that he wanted Cenname to move in because otherwise he was going to lose rent on the apartment (R. 17: 191-92, 194). Kitten testified that he did not force the issue of the six months more rent up front after Cenname reneged on his promise to pay it, and that it was not a condition of his moving in and taking the apartment (R. 17: 192-94).

Cenname asked Kitten to return his money (R. 17: 54, 137). Kitten stated that he would return the security deposit and what was left of the first month's rent after he rented the apartment (R. 17: 54, 137). Cenname demanded that Kitten return all his money (R. 17: 54-55). Kitten never returned any of the money (R. 17: 55).

On October 11, 1998, Cenname signed a lease for another apartment, but he did not leave the hospital to move into the apartment until October 22, 1998 (R. 17: 80-82; Ex. 4). The apartment is smaller and Cenname

[4] Terry Sass, a property manager for Kitten and one of Kitten's former tenants, testified that it was Kitten's standard rental practice to leave the checklist, the keys and the garage door opener in the rental unit for a new tenant, and to leave the unit open (R. 17: 157-161).

paid $1,150 per month in rent (R. 17: 81). As a result of not taking occupancy of Kitten's apartment, Cenname incurred a telephone disconnection charge of $48.67, an attorney's fee of $200, an additional $225 per month in rent, and the loss of $1,925 in earnest money to Kitten (R. 17: 83-85, 96; Exs. 6-7). In addition, he was paying $400 per day for residential treatment and he had to focus with his therapists on the situation with Kitten instead of on his transition to the community (R. 17: 87-88, 116). The situation with Kitten made Cenname feel very uncomfortable and made him unable to sleep (R. 17: 88-89). It also caused him to have headaches, to exercise compulsively, to binge compulsively on food, and to smoke more than half a pack per day after he earlier had quit smoking (R. 17: 90-91).

On March 10, 1999, Cenname filed a housing discrimination complaint against Kitten under the WOHA. On April 29, 1999, a Department equal rights officer initially determined that there was probable cause to believe that Kitten had violated the WOHA. Kitten and Cenname expressly waived the opportunity to have the claims asserted by Cenname decided in a civil action in court rather than in an administrative hearing. On June 8, 1999, the case was noticed for hearing on the issue of whether Kitten had violated the WOHA by exacting a different price, terms or conditions for the rental or lease of housing because of disability. A hearing was conducted on September 9, 1999, before a Department examiner.[5]

On February 22, 2000, the examiner issued the Department's decision. The examiner found that "Kitten exacted different and more stringent price, terms and

[5] The WOHA refers to persons who hear and decide complaints as "hearing examiners" or as "examiners" and not as "administrative law judges" except in one subsection. *Cf.* Wis. Stat. § 106.04(6)(b), (f), (h)1. and 2., and (i) with Wis. Stat. § 106.04(6)(h)3; *cf. Motola v. LIRC*, 219 Wis. 2d 588, 596 n. 8, 580 N.W.2d 297 (1998). Consistent with the statute, this brief will use the term "examiner."

conditions on Cenname for leasing the apartment . . . because Kitten regarded Cenname's eating disorder to be a physical and mental impairment that would prevent Cenname from living on his own, outside of a hospital. Kitten also feared that Cenname's eating disorder would cause Cenname to suffer from depression and lead to Cenname attempting to commit suicide" (Finding 28) (A-Ap. 107). In a memorandum opinion, the examiner stated that Kitten's evidence was less credible than Cenname's evidence, and that Kitten's sole reason for requiring Cenname to pay six months more rent up front was Kitten's concern that Cenname would have a relapse of his eating disorder and would require hospitalization (Memo. Opn., pp. 10-11) (A-Ap. 110-111). In addition, although the examiner determined that while Cenname failed to prove that he had a "disability" or a "record" of having a "disability" within the meaning of the WOHA, the evidence was sufficient to establish that Kitten "regarded" Cenname as having a "disability" within the meaning of the WOHA (Memo. Opn., p. 11) (A-Ap. 111).

The examiner explained:

> However, the [examiner] determines that there is sufficient evidence to establish that [Kitten] regarded [Cenname's] eating disorder as being a physical or mental impairment that substantially limited [Cenname's] ability to enjoy major life functions. Specifically, [Kitten] clearly showed by his actions and his statements that he believed that [Cenname's] eating disorder would cause [Cennname] to be unable to take care of himself and live on his own. Specifically, [Kitten] believed that [Cenname] would have a relapse of his eating disorder symptoms while living alone and would require continuing hospitalization. Alternatively, [Kitten] hypothesized that [Cenname's] eating disorder would cause [Cenname] to suffer from serious depression and attempt to commit suicide. Given [Kitten's] belief that [Cenname's] eating disorder would prevent him from being able to live on his own and take care of himself without further hospitalization or attempts on his life, the [examiner] determines that [Kitten]

> regarded [Cenname] as having a disability within the meaning of the WOHA.

(Memo. Opn., p. 11) (A-Ap. 111).

The examiner ordered Kitten to pay Cenname the sum of $12,673.67 for out-of pocket expenses. Such expenses included (1) $8,000.00 for twenty additional days of hospitalization at $400 per day, from October 2, 1998, when Cenname would have moved into Kitten's apartment until October 22, 1998, when Cenname was discharged from the hospital to move into another apartment, (2) $2,700.00 in additional rent that he had to pay for the other apartment, (3) $48.67 for disconnecting telephone service at Kitten's apartment, (4) $200.00 for attorney's fees for the period September 27 through October 1, 1998, and (5) $1,925.00 paid by Cenname to Kitten.

The examiner ordered Kitten to pay Cenname the sum of $10,000 for emotional distress. The examiner ordered Kitten to pay the State of Wisconsin the sum of $5,000.00 as a forfeiture. The examiner ordered less than the maximum forfeiture of $10,000.00 because of the other amounts awarded to Cenname for out-of pocket expenses and emotional distress, plus interest. Finally, the examiner ordered Kitten to pay Cenname the sum of $4,738.00 for his reasonable attorney's fees and costs.

On March 20, 2000, Kitten commenced this proceeding for judicial review of the Department's decision (R. 1). On November 20, 2000, the circuit court entered its decision and order affirming the Department's decision in all respects (R. 15; A-Ap. 116-120). The circuit court decided that there was substantial evidence in the record to support the Department's finding that Kitten exacted different rental from Cenname because of a disability and not because of economic considerations (R. 15: 4; A-Ap. 119). The circuit court also decided that Cenname did not have to prove that he actually had an impairment, in order to recover under the WOHA, and that it was sufficient for him to prove that Kitten regarded

or perceived him as having an impairment (R. 15: 3; A-Ap. 118). Finally, the circuit court decided that Kitten perceived Cenname as having a disability within the meaning of the WOHA because he feared that Cenname was suicidal or that Cenname would have to return to the hospital (R. 15: 3-4; A-Ap. 118-19).

On December 28, 2000, Kitten appealed from the order of the circuit court to the court of appeals (R. 16). On August 8, 2001, the Court of Appeals, District 2, issued is decision and order affirming the order of the circuit court (A-AP. 121-37). *See Kitten v. State Dept. of Workforce Development,* 2001 WI App 218, 624 N.W.2d 583. The court of appeals decided that there was substantial evidence in the record to sustain the Department's finding that Kitten exacted different rental from Cenname because of a disability and not because of economic considerations (A-Ap. 132-133, 135). *See Kitten*, 2001 WI App 218, ¶¶ 23-25, 28, 634 N.W.2d at 591-92. The court of appeals also decided that Cenname did not have to prove that he actually had an impairment, in order to recover under the WOHA, and that it was sufficient for him to prove that Kitten regarded or perceived him as having an impairment (A-Ap. 135-36). *See id.*, ¶¶ 29-30, 634 N.W.2d at 591-92. Finally, the court of appeals decided that because Kitten believed that Cenname's eating disorder would prevent him from being able to live on his own and to take care of himself without further hospitalization or attempts on his life, the Department reasonably could determine that Kitten regarded Cenname as having a "disability" within the meaning of the WOHA, as having a physical or mental impairment that would substantially limit one or more of his major life activities (A-Ap. 133-34, 136-37). *See id.*, ¶¶ 26, 31, 634 N.W. 2d at 591-92.

On August 31, 2000, Kitten petitioned for review of the decision of the court of appeals by the Wisconsin Supreme Court. On October 23, 2001, this court granted the petition and ordered the filing of briefs. This brief of

the Department is filed in accordance with that order and with Wis. Stat. § 809.62.

STATUTES INVOLVED

Wis. Stat. §§ 106.04(1m)(g) and (h) provide:

> (g) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, a record of having such an impairment or **being regarded as having such an impairment**. . . .
>
> (h) "Discriminate" means to . . . treat a person . . . unequally in a manner described in sub. (2) . . . because of . . . disability . . . .

Wis. Stat. § 106.04(2)(a) and (b) provide:

> It is unlawful for any person to discriminate:
>
> (a) By refusing to . . . rent . . . .
>
> (b) By . . . exacting different or more stringent price, terms or conditions for the . . . lease . . . or rental of housing.

Wis. Stat. § 106.04(6) provides in pertinent part:

> . . .
>
> (b) . . . The department of workforce development shall employ examiners to hear and decide complaints of discrimination under this section . . . . The examiners may make findings and issue orders under this subsection. . . .
>
> (c) 1. . . .
>
> 2. . . . If the department determines that probable cause exists, the department shall immediately issue a charge on behalf of the aggrieved person. . . . When a charge is filed, a complainant [or] a respondent . . . may elect to have the claims asserted in that charge decided in a civil

action under sub. (6m) in lieu of a hearing under par. (f). . . .

. . .

(f) . . .

5. If after the hearing the examiner finds by a fair preponderance of the evidence that the respondent has violated sub. (2) . . ., the examiner shall make written findings and order the respondent to take such actions that will effectuate the purpose of sub. (2) . . ., and may order other penalties, damages and costs as provided in pars. (h) and (i). . . . [E]nforcement of the order is automatically stayed upon the filing of a petition for review under par. (j).

. . .

(h) . . . 1. If the hearing examiner finds that a respondent has engaged in . . . a discriminatory act prohibited under sub. (2) . . ., the hearing examiner shall promptly issue an order for such relief as may be appropriate, which may include economic and noneconomic damages . . . . The hearing examiner may not order punitive damages.

. . .

3. In addition to any damages ordered under subd. 1., the administrative law judge may assess a forfeiture against a respondent who is a natural person in an amount not exceeding $10,000 . . . .

(i) . . . The hearing examiner may allow a prevailing complainant . . . reasonable attorney fees and costs. . . .

Wis. Stat. § 100.264(1) provides in pertinent part:

(a) "Disabled person" means a person who has an impairment of a physical, mental or emotional nature that substantially limits at least one major life activity.

. . .

(c) "Major life activity" means self-care, walking, seeing, hearing, speaking, breathing, learning, performing manual tasks or being able to be gainfully employed."

SUMMARY OF ARGUMENT

This case is really quite simple and straightforward. The WOHA makes it unlawful to "discriminate," *i.e.*, to treat a person unequally because of disability, by exacting a different or more stringent price, terms or conditions for the lease or rental of housing. *See* Wis. Stat. § 106.04(1m)(h) and (2)(b). The Department found, and substantial evidence in the record supports the Department's finding, that Kitten exacted different rental terms from Cenname because of a disability and not because of economic considerations.

Two issues are presented on review: (1) whether, to be considered an individual with a "disability" within the meaning of the Wisconsin Open Housing Act (WOHA), it is not necessary that an individual have an actual physical or mental impairment that substantially limits one or more major life activities, or whether it is sufficient if the landlord merely perceives that the individual has such an impairment, and (2) whether an "eating disorder" that would cause an individual to be unable to take care of himself and to live on his own, because of a possible relapse requiring further hospitalization or because of associated depression which might lead him to commit suicide, is a physical or mental impairment that a landlord might perceive as being a disability within the meaning of the WOHA. The first issue clearly is resolved by the WOHA itself because the WOHA defines "disability" to include not only a physical or mental impairment that substantially limits one or more major life activities, but, also, "being **regarded** as having such an impairment." *See* Wis. Stat. § 106.04(1m)(g) (emphasis added). In *City of La Crosse Police & Fire Comm. v. LIRC*, 139 Wis. 2d 740, 407 N.W.2d 510

(1987), this Court reached the same conclusion when it interpreted and applied the Wisconsin Fair Employment Act (WFEA) before the WFEA was amended expressly to include within the definition of a "handicapped individual" and later an "individual with a disability" an individual who is "**perceived** as having such an impairment." *See* Wis. Stat. § 111.32(8).

The second issue also is properly answered affirmatively, applying the analytical process utilized by this court in *City of La Crosse Police & Fire Comm.* There are two steps in the analytical process: (1) there must be a perceived impairment, **and** (2) the impairment must be perceived as substantially limiting one or more major life activities. *See City of La Crosse Police & Fire Comm.*, 139 Wis. 2d at 740. Both steps are satisfied in this case. An "eating disorder" that would cause an individual to be unable to take care of himself and to live on his own, because of a possible relapse requiring further hospitalization or because of associated depression which might lead him to commit suicide, is a physical or mental impairment that a landlord might perceive as substantially limiting one or more major life activities.

ARGUMENT

I. THE DEPARTMENT REASONABLY COULD CONCLUDE THAT IN ORDER TO BE CONSIDERED AN INDIVIDUAL WITH A "DISABILITY" WITHIN THE MEANING OF THE WISCONSIN OPEN HOUSING ACT (WOHA), IT IS NOT NECESSARY THAT AN INDIVIDUAL HAVE AN ACTUAL PHYSICAL OR MENTAL IMPAIRMENT THAT SUBSTANTIALLY LIMITS ONE OR MORE MAJOR LIFE ACTIVITIES, BUT THAT IT IS SUFFICIENT IF THE LANDLORD MERELY PERCEIVES THAT THE INDIVIDUAL HAS SUCH AN IMPAIRMENT.

A. The Department's interpretation and application of the WOHA should be affirmed if they are reasonable.

The Wisconsin Supreme Court has generally applied three levels of deference when reviewing an agency's interpretation and application of a statute. *See Jicha v. DILHR*, 169 Wis. 2d 284, 290-291, 485 N.W.2d 256 (1992); *Sauk County v. WERC*, 165 Wis. 2d 406, 413-414, 477 N.W.2d 267 (1991).[6] The three levels of deference to an agency's statutory interpretation ("great weight," "due weight," and "no weight" or "*de novo*" review) depend

[6] The varying levels of deference to decisions of an agency apply to decisions of the Department under the WOHA, even though the decision of a single examiner is the final Department decision. *Cf. Jicha*, 169 Wis. 2d at 291-92.

upon whether the issue is one where the agency's experience and specialized knowledge aid the agency in its interpretation (and intertwines factual determinations with value or policy determinations), where the issue is "very nearly" one of first impression, or where the issue is "clearly" one of first impression and the agency has no special experience or expertise in determining the issue. *Id.* In this case, any one of the three levels of deference arguably could be applied because the issue could be characterized as one intertwined with value or policy determinations, or as one "very nearly" or "clearly" of first impression.

The court of appeals decided that the proper standard of review to be given to the Department's legal conclusions in this case is "great weight" deference since the Department is charged with the duty of administering the WOHA (A-Ap. 134-35). *See Kitten*, 2001 WI App 218, ¶ 27, 634 N.W.2d at 591-92. Under the great weight standard of review, the agency's reasonable interpretation of the statute will be upheld if it is not contrary to the clear meaning of the statute, even if the reviewing court were to conclude that another interpretation of the statute was more reasonable. *See Kannenberg v. LIRC*, 213 Wis. 2d 373, 385, 571 N.W.2d 165 (Ct. App. 1997). Even under the due weight standard, a reviewing court will uphold the agency's reasonable interpretation if it comports with the purpose of the statute and if the court concludes that there is not a more reasonable interpretation of the statute. *See id.* In this case, the court of appeals stated that even if it were to apply a *de novo* standard of review, it would have reached the same result (A-Ap. 135). *See Kitten*, 2001 WI App 218, ¶ 27, 634 N.W.2d at 592.

B. The Department's findings must be affirmed if they are supported by substantial evidence in the record.

The Department's findings of fact must be affirmed if they are supported by substantial evidence in the record. *See Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis. 2d 540, 562, 151 N.W.2d 617 (1967); *Chicago, M., St. P. & P. R.R. Co. v. ILHR Dept.*, 62 Wis. 2d 392, 396, 215 N.W.2d 443 (1974). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Gateway City Transfer Co. v. Public Service Comm.*, 253 Wis. 397, 405-06, 34 N.W.2d 238 (1948), *quoting, Consolidated Edison Co. v. National L.R. Board,* 305 U.S. 197, 229 (1938). It is not required that the evidence be subject to no other reasonable, equally plausible interpretations. *Hamilton v. ILHR Dept.*, 94 Wis. 2d 611, 617, 288 N.W.2d 857 (1980). Where two conflicting views of the evidence each may be sustained by substantial evidence, it is for the agency to determine which view of the evidence it wishes to accept. *See Robertson Transp. Co. v. Public Service Comm.,* 39 Wis. 2d 653, 658, 159 N.W.2d 636 (1968).

The weight and credibility of the evidence are matters for the agency, and not for the reviewing court, to evaluate. *See Bucyrus-Erie Co. v. ILHR Dept.,* 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979); Wis. Stat. § 227.57(6). When more than one inference reasonably can be drawn, the finding of the agency is conclusive. *See Vocational, Technical & Adult Ed. Dist. 13 v. ILHR Dept.*, 76 Wis. 2d 230, 240, 251 N.W.2d 41 (1977).

On review, a court may not make an independent determination of the facts. *See Hixon v. Public Serv. Comm.*, 32 Wis. 2d 608, 629, 146 N.W.2d 577 (1966). The court is "confined to the determination of whether there was . . . [substantial evidence] to sustain the findings that were in fact made." *E.F. Brewer Co. v. ILHR*

Department, 82 Wis. 2d 634, 636, 264 N.W.2d 222 (1978).

A court may not "second guess" the proper exercise of the agency's fact-finding function even though, if viewing the case *ab initio*, it would come to another result. *See Briggs & Stratton Corp. v. ILHR Department*, 43 Wis. 2d 398, 409, 168 N.W.2d 817 (1969). The court must search the record to locate substantial evidence that supports the agency's decision. *See Vande Zande v. ILHR Department*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

In summary, as the court stated in *Hamilton*, 94 Wis. 2d at 618:

> [T]he agency's decision may be set aside by a reviewing court only when, upon an examination of the entire record, the evidence, including inferences therefrom, is found to be such that a reasonable person, acting reasonably, could not have reached the decision from the evidence and its inferences.

C. The Department interpretation of the WOHA is reasonable.

The Department decided (and the courts below agreed) that in order to be considered an individual with a "disability" within the meaning of the Wisconsin Open Housing Act (WOHA), it is not necessary that an individual have an actual physical or mental impairment that substantially limits one or more major life activities, but that it is sufficient if the landlord merely perceives that the individual has such an impairment. The Department's interpretation of the statute is reasonable; it is consistent with the plain language of the statute, it is consistent with this court's interpretation of the WFEA in *City of La Crosse Police & Fire Comm.*, and it is consistent with the purpose of the statute.

The WOHA defines "disability" to mean a physical or mental impairment that substantially limits one of more major life activities. *See* Wis. Stat. § 106.04(1m)(g). The WOHA **also** defines an individual with a "disability" as an individual who is "regarded as having such an impairment. *See id.* Since the statute is phrased in the disjunctive, the Department reasonably could interpret the "regarded as" language to mean that it is not necessary that an individual have an actual physical or mental impairment that substantially limits one or more major life activities, and that it is sufficient if the landlord merely perceives that the individual has such an impairment.

In *City of La Crosse Police & Fire Comm.*, this court reached the same result when interpreting the WFEA, even though the WFEA had not yet been amended to add "perceived as" language to its definition of "handicapped individual." *See City of La Crosse Police & Fire Comm.*, 139 Wis. 2d at 744, 758, 765. This court quoted from its earlier decision in *Brown County v. LIRC*, 124 Wis. 2d 560, 369 N.W.2d 735 (1985):

> "*American Motors* and *Dairy Equipment* both recognized that a job applicant would also be perceived as handicapped of he had no physical limitation or condition at all but was erroneously thought by the employer to have an impairment that limited his capacity to work."

124 Wis. 2d at 569 n. 9.

In *City of La Crosse Police & Fire Comm.*, the employer perceived that an applicant for employment had a "weak back" or "back problems" that limited his capacity to work as a police officer. In fact, the applicant did not have any back problems. This court concluded that the applicant was entitled to the protections of the WFEA because, even though he had no actual impairment, the employer perceived that he had such an impairment.

This court should affirm the Department's reasonable interpretation of the WOHA which is

consistent with the language of the statute and with this Court's interpretation of a similar statute in *City of La Crosse Police & Fire Comm.* Although Kitten has cited numerous decisions in his brief, interpreting the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101, *et seq.*, none of the cases that he cites stand for the proposition that in order to prove that a person has a "disability" within the meaning of a particular federal statute, it is necessary to prove that an individual has an actual physical or mental impairment, and that it is not sufficient if the landlord merely perceives that the individual has such an impairment.[7]

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[7] The several cases cited by Kitten establish broad principles of disability discrimination law, only some of which are relevant to this case. *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999), *Murphy v. UPS*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), hold that in order to demonstrate a "disability" within the meaning of the ADA, an impairment must "substantially limit" or be regarded as "substantially limiting" a "major life activity," that mitigating measures must be taken into account in judging whether an individual is substantially limited in a major life activity, *see Sutton*, 527 U.S. at 482; *Albertson's Inc.*, 527 U.S. at 565-67, that with respect to the major life activity of working, there must be a "significant restriction" of the class of jobs in which the individual is able to work, *see Sutton*, 527 U.S. at 491-92; *Murphy*, 527 U.S. at 564-65; and that with respect to the major life activity of seeing, the individual's monocular vision must substantially limit his seeing, *see Albertson's, Inc.*, 527 U.S. 563-65. Similarly, *Weber v. Strippit, Inc.*, 186 F.3d 907, 913-15 (8th Cir. 1999), *Duncan v. Washington Metro. Area Transit Authority*, 240 F.3d 1110, 1114-16 (D.C. Cir. 2001), *Sinkler v. Midwest Property Management Ltd.*, 209 F.3d 678, 683-86 (7th Cir. 2000); *Brunko v. Mercy Hosp.*, 260 F.3d 939, 941-42 (8th Cir. 2001); and *Thornton v. McClatchy Newspapers, Inc.*, 261 F.3d 789, 794-96, 798 (9th Cir. 2001), all stand for the proposition that where working is the major life activity identified by the plaintiff, the impairment must actually limit or be perceived as limiting the plaintiff from working in a broad range of jobs. Finally, *Weber*, 186 F.3d at 914 and *Maynard v. Pneumatic Products Corp.*, 233 F.3d 1344, 1347-49 (11th Cir. 2000), and *Land v. Baptist Medical Center*, 164 F.3d 423, 424-25 (8th Cir. 1999), stand for the proposition that where the major life activities are walking, or eating and breathing, respectively, the plaintiff must show that such activities are significantly restricted, or are perceived as being significantly restricted, as compared to the average person in the general population.

The Department's interpretation also in consistent with the purpose of the "regarded as" provision of the WOHA. The provision is designed to protect against erroneous stereotypes some landlords hold regarding physical or mental impairments that are not substantially limiting in fact. *Cf. Sutton v. United Airlines, Inc.*, 527 U.S. 471, 489-90 (1999). In *School Board of Nassau County, Florida v. Arline*, 480 U.S. 273, 284 (1987), the court observed that the "regarded as" provision reflects legislative acknowledgment that "society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from the actual impairment." *See Sutton*, 527 U.S. at 489-90.

II. THE DEPARTMENT REASONABLY COULD CONCLUDE THAT AN "EATING DISORDER" THAT WOULD CAUSE AN INDIVIDUAL TO BE UNABLE TO TAKE CARE OF HIMSELF AND TO LIVE ON HIS OWN, BECAUSE OF A POSSIBLE RELAPSE REQUIRING FURTHER HOSPITALIZATION OR BECAUSE OF ASSOCIATED DEPRESSION WHICH MIGHT LEAD HIM TO COMMIT SUICIDE, A PHYSICAL OR MENTAL IMPAIRMENT THAT A LANDLORD MIGHT PERCEIVE AS BEING A "DISABILITY" WITHIN THE MEANING OF THE WOHA.

In *City of La Crosse Police & Fire Comm.*, this court held that in order to prove that an individual has a "handicap" or "a disability" within the meaning of the statute, it is necessary for the individual to show (1) a real

or perceived physical or mental impairment, and (2) that the impairment actually makes or is perceived as making achievement unusually difficult or limiting the capacity to work. *See* 139 Wis. 2d at 760-61. The court interpreted the statutory phrase "makes achievement unusually difficult" as the equivalent of the language now contained in the WOHA: "substantially limits one or more major life activities." *See* 139 Wis. 2d at 761. Consequently, in order to prevail on a perceived disability theory under the WOHA, the individual must prove not only that the landlord perceived that the individual had a physical or mental impairment, but that the landlord also perceived that the impairment substantially limited one or more major life activities -- even if the impairment did not actually limit any major life activity. *See id.*

In this case, the Department decided that Cenname failed to prove that his eating disorder was an **actual** physical or mental impairment that substantially limited one or more major life activities (A-Ap. 111). Nonetheless, the Department also decided that there was sufficient evidence to establish that Kitten "regarded" Cenname's eating disorder as being a physical or mental impairment, **and** that Kitten perceived that such impairment substantially limited Cenname's ability to take care of himself and to live on his own (A-Ap. 111). Specifically, the Department found that Kitten believed that Cenname would have a relapse of his eating disorder when living alone that would require further hospitalization, or that serious depression associated with his eating disorder would cause him to attempt to commit suicide (A-Ap. 111).

Both the circuit court and the court of appeals agreed that the Department reasonably could conclude that Kitten perceived that such impairment substantially limited Cenname's ability to take care of himself and to live on his own. The court of appeals noted that a separate state statutory provision, Wis. Stat. § 106.04(1)(c) defines a "major life activity" to mean "self-care, walking, seeing, hearing, speaking, breathing, learning, performing manual

tasks, or being able to be gainfully employed" (A-Ap. 122). *Cf.* 29 C.F.R. § 1630.1(i). The term "substantially limits" means that the individual "is either unable to perform, or significantly restricted as to the condition, manner or duration under which the individual can perform, a major life activity as compared to the average person in the general population." *See* 29 C.F.R. § 1630.2(j)(1)(ii). An eating disorder can substantially limit major life activities. *See Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000). Applying the statutory terminology, the courts below correctly concluded that the Department could reasonably determine that Kitten perceived that Cenname's eating disorder "substantially limited" a "major life activity," *i.e.,* his ability to take care of himself and to live on his own. Certainly, Kitten would not have perceived an average person in the general population as being unable to take care of himself or herself, or to live on his or her own.

Kitten argues that even if he perceived that Cenname could not take care of himself and live on his own, because he might have a relapse and require further hospitalization, or because he might attempt suicide as the result of severe depression connected with eating disorders, such perception is not sufficient to establish a "substantial" limitation of a major life activity (Kitten's brief, p. 20). Kitten argues, alternatively, that the only information that he had was that Cenname had been hospitalized for an eating disorder for which he was being treated, that he was being released with the expectation that he would be living on his own in an apartment, and that while he once had suicidal tendencies, his mother indicated that it was not a present concern (Kitten's brief, pp. 24-25). The Department's response is two-fold.

First, substantial evidence in the record supports the Department's finding that Kitten was concerned that Cenname might attempt suicide. Kitten testified that he was concerned that Cenname was a danger to himself and to other tenants because Cenname might attempt suicide by trying to asphyxiate himself while sitting in the garage

with his car exhausting fumes (R. 17: 211-12).[8] Cenname testified that Kitten expressed those same concerns to him (R. 17: 42, 132-33).

Second, even if one could reasonably argue that it is not "disability" discrimination within the meaning of the WOHA for a landlord to refuse housing based upon an eating disorder that the landlord perceives will prevent a prospective tenant from taking care of himself and living on his own (because the tenant might relapse and require further hospitalization, or because the tenant might attempt suicide), the Department's contrary conclusion is equally reasonable. The circuit court judge and three judges on the court of appeals panel in this case all determined that the Department's conclusion was reasonable. Consequently, regardless of whether the Department's interpretation of the WOHA is afforded "great weight" or "due weight" in this case, its interpretation must be affirmed. *See Kannenberg*, 213 Wis. 2d at 385.

In summary, the Department respectfully submits that it reasonably interpreted and applied the WOHA when it decided that it was not necessary for Cenname to prove that he had an actual "disability" and that Kitten perceived both that Cenname had a physical or mental impairment, and that such impairment substantially limited one or more major life activities.

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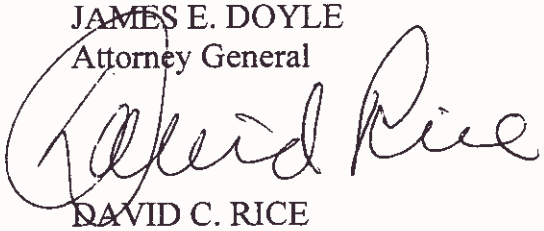
[8] The WOHA permits a landlord to refuse housing to an individual whose tenancy would constitute a "direct threat to the safety of other tenants or persons employed on the property or whose tenancy would result in substantial physical damage to the property of others, if the risk of direct threat or damage cannot be eliminated or sufficiently reduced through reasonable accommodations." *See* Wis. Stat. 106.04(5m)(d). Although Kitten testified that he had concerns that Cenname might be a danger to himself or to others (R. 17: 211-12), he has not raised the "direct threat to safety" defense in this case.

CONCLUSION

The Department respectfully requests that the Court affirm the order of the court of appeals, that affirmed the order of the circuit court and that affirmed the Department's decision and order in their entirety.

JAMES E. DOYLE
Attorney General



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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced using the following font:

☐ Monospaced font: 10 characters per inch; doubled spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

☑ Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 8,661 words.

Dated this 29th day of November, 2001.

David C. Rice
Assistant Attorney General

STATE OF WISCONSIN

SUPREME COURT

No. 00-3562

Donald R. Kitten,
Plaintiff-Appellant-Petitioner,

v.

State of Wisconsin
Department of Workforce Development
Defendant-Respondent

APPEAL FROM AN ORDER OF THE
COURT OF APPEALS, DISTRICT 2,
THAT AFFIRMED AN ORDER OF THE
CIRCUIT COURT FOR WAUKESHA COUNTY,
HONORABLE DONALD J. HASSIN, JR. PRESIDING

PLAINTIFF-APPELLANT-PETITIONER'S REPLY BRIEF

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I. THE STANDARD OF REVIEW

THE DEPARTMENT'S INTERPRETATION OF THE WISCONSIN OPEN HOUSING ACT IS CONTRARY TO LAW

The Department in its initial stage of argument in its brief in this matter seems to break the argument down into two segments, i.e. first, what Standard of Review should be applied and, secondly, the argument that the Department has reasonably interpreted the Wisconsin Open Housing Act to include perceived disability. On page 20 of its brief, the State concedes that, in this case, any one of the three levels of deference to the agency's determination could be applied because the issue could be characterized as one intertwined with value or policy determinations, or as one "very nearly" or "clearly" of first impression. The argument of the petitioner is not as the State's brief would seem to indicate, that there cannot be a perceived disability finding, but rather that there cannot be a perceived disability finding in this particular case. Under §227.57 of the Wisconsin Statutes, sub section 5 indicates:

> "The Court shall set aside or modify the agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action or it shall remand the case to the agency for further action under a correct interpretation of the provision of law."

The same statute goes on to indicate in sub paragraph 6 that if the agency's action depends on any fact found by the agency in a contested case proceeding, the Court shall not substitute its judgment for that of the agency as for the weight of the evidence on any disputed finding of fact. The Court shall, however, set aside the agency action, remand the case to the agency, if it finds that the agency's action depends on any finding of fact that is not supported by substantial evidence in the record.

The petitioner first contests the agency's factual finding that the petitioner was motivated by discrimination rather than economics in any actions that he took relating to the complainant in this matter. Those arguments of the petitioner have been previously briefed. Assuming, however, that all of the factual findings of the agency are to be upheld, the real question is whether or not the Administrative Law Judge in this matter could reasonably conclude that the there was discrimination as a conclusion of law based upon those facts. When reviewing an administrative agency's conclusion of law, the reviewing court is not bound by those conclusions, but will sustain them if reasonable. *Cuna Mut. Insurance Society vs. Wisconsin Department of Revenue*, 355 NW2d 541120 W2d 445 (App. 1984) Where the facts are not in dispute, a determination of whether a relationship of employer and employee existed constituted a conclusion of law and the determination of the Industrial Commission in that regard was not conclusive *Waseka vs. Industrial Commission*, 38 NW2d 470 255 Wis. 337 (1949). The Court of Appeals is not bound by an agency's conclusions on matters of law. *City*

of LaCrosse vs. Wisconsin Department of Natural Resources, 353 NW2d 68 120 W2d 168 (1984).

On page 24 of the agency's brief, numerous decisions are cited in the footnote (F.7), which had been cited by the petitioner in his brief and referenced with the language "although Kitten has cited numerous decisions in his brief, interpreting the Americans With Disabilities Act (88) 42 U.S.C. Section 121.01 et. seq., none of the cases that he cites stand for the proposition that in order to prove that a person has a disability within the meaning of a particular federal statute, it is necessary to prove that an individual has an actual physical or mental impairment and that it is sufficient if the landlord perceives that the individual has such an impairment." The afore-quoted statement in the agency's brief is correct in that the petitioner is not arguing that there cannot be perceived disability. The petitioner's position is that in order to have a case of perceived disability, the disability must rise to the level of impairment set forth in the cases cited on page 24 of the agency's brief, i.e. the impairment must be "substantially limiting" as to a major life activity. *Sutton vs. United Airlines, Inc.*, 527 U.S. 471 (1999), there must be a "significant restriction". *Albertson's, Inc.*, 527 U.S. 565. In the series of cases set forth in footnote 7 of the agency's brief, the cases stand for the proposition that when working is the major life activity identified, the impairment must actually limit or be perceived as limiting the plaintiff from working in a broad range of jobs. The plaintiff must also show that such activities are significantly restricted or are perceived as being significantly restricted as

compared to the average person in the general population. *Land vs. Baptist Medical Center*, 164 F3d 423 (8 Cir. 1999). It is submitted that the cases cited by the petitioner in his brief, and restated on page 24 of the agency's brief, support the position of the petitioner that the agency made an erroneous conclusion of law in the fact situation before it in this particular case. While the petitioner has at all times taken the position, and remains of the position, that all of his actions with dealing with the complainant were economic and for the protection of his property, it is argued that even rejecting that position, the agency was in error in concluding as a matter of law that any action on the part of the petitioner, as relates to the complainant, could constitute perceived discrimination without the perceived condition having risen to the level of disability required by the cited cases. Keeping in mind again that the reported cases are almost all employment cases, a recent federal case in an employment case advances the same proposition that the petitioner does in this case. In *Freeman vs. Madison Metropolitan School District*, 231 F.3d 374 (CA 7 2000), the Court held that once an employer provides a legitimate, non-discriminatory reason for the action challenged in a discrimination suit, the employee must establish that the reasons proffered by the employer are pretextual by presenting direct evidence (in the Freeman case, that the person's race) played a role in the employer's action. In *Malacara vs. City of Madison*, 224 F3d 727 (CA 7 2000), the Court indicated that an employer may hire or refuse to hire an employee for a good reason, a bad reason, a reason based

on erroneous facts, or for no reason or all, as long as its action is not for a discriminatory reason.

II. THE DEPARTMENT'S DETERMINATION REGARDING PERCEIVED DISABILITY IN THIS CASE IS IN ERROR.

In footnote 8 on page 28 of the agency's brief, the agency concedes that the Wisconsin Open Housing Act permits a landlord to refuse housing to an individual whose tenancy would constitute a direct threat to the safety of other tenants, but indicates that although the petitioner testified that he had concerns in that regard, he has not raised the direct threat to safety defense in this case. Petitioner takes the opposite position, in this regard, and points out that this issue is raised before the Administrative Law Judge in petitioner's initial brief on page 23, where he refers to an employer not being able to justify its alleged discriminations under the statutory exceptions and has reference in that brief on page 36 to 79 USCS 706 and exceptions to discriminations for persons who are alcoholics, drug users, or whose employment by alcoholic or drug abuse would constitute a direct threat to property or safety of others. (Record 7-1a Administrative File). The issue is also raised of the Appellate Court in the Statement of the Case on page 9, where the petitioner cites statements from the transcript about potentially being concerned about problems such as drugs or whether or not the complainant might be a danger to himself or other tenants (Transcript 188, 211-212, 216), reference to statutory exceptions on page 24 of the Petitioner's Appellate Court Brief, and page 23 of the Petition For Review.

It is submitted that the Decision of the Administrative Law Judge in this matter followed by all of the briefing on behalf of the complainant and the State fail to answer the singularly most important questions, which has been argued throughout, that being:

> "Assuming hypothetically that the petitioner perceived the complainant to have the condition that the complainant indicates that he suffered from, and with no information of any kind or nature that the petitioner had any knowledge beyond that regarding the complainant's condition, could he be found to have discriminated on the basis of a disability, when the condition of the complainant does not qualify as such under the law?"

The petitioner has never argued that the Wisconsin Open Housing Act does not prohibit perceived discrimination nor does he contest that there can be perceived discrimination. The petitioner's position is that in order for perceived discrimination to exist, there must be a perception that the complainant suffers with a disability, which would be sufficiently significant to constitute a disability under the Wisconsin Open Housing Act. As stated in previous briefs, there is no evidence in the record in this matter that the complainant suffered a significant restriction on a major life activity, or was substantially limited in a major life activity, as referred to in *Albertson's, Inc. vs. Kirkinburg*, 527 U.S. 555 (1999), *Thornton vs. McClatchy Newspapers, Inc.*, 261 F.3d 789 (9th Cir. 2001) and numerous other cases cited in both the petitioner's and the agency's brief. Nor is there any kind or nature of evidence in the record that any restrictions upon the complainant were compared to the average person in the general population as

required by case law. *Land vs. Baptist Medical Center*, 164 F.3d 423 (8th Cir. 1999). There is also no evidence of any kind or nature in the record that the petitioner, at any time during his relationship with the complainant, had any perception of a disability on the part of the complainant beyond that which was transmitted to him by the complainant himself and the complainant's mother and which condition was determined by the Administrative Law Judge to have failed to rise to the level of a true disability.

CONCLUSION

It is submitted that is clear from the law cited by the petitioner in this matter, many of the cases being very recent and many of them having been decided at the summary judgment stage, that the impairment claimed by the complainant did not rise to the level of a legal disability under the statute and the petitioner could not have perceived a disability that rose to that level.

Respectfully submitted,

PHIL ELLIOTT, JR.

CERTIFICATION

I hereby certify that this brief conforms to the rules in x. 809.19(8)(b) and (c) for a brief produced using the following font.

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters for full line of body test. The length of this brief is 7 pages and 1786 words.

Signed this 7th day of December, 2001

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STATE OF WISCONSIN

IN SUPREME COURT

—

NO. 00-3562

DONALD R. KITTEN

Plaintiff-Appellant-Petitioner

v.

STATE OF WISCONSIN DEPARTMENT
OF WORKFORCE DEVELOPMENT

Defendant-Respondent

APPEAL FROM AN ORDER OF THE
COURT OF APPEALS DISTRICT 2
THAT AFFIRMED AN ORDER OF THE
CIRCUIT COURT FOR WAUKESHA COUNTY,
HONORABLE DONALD J. HASSIN, JR. PRESIDING

BRIEF OF AMICUS CURIAE WISCONSIN COALITION FOR ADVOCACY

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STATEMENT OF INTEREST

The Wisconsin Coalition for Advocacy, Inc. is a statewide, private, non-profit agency that has been designated by the Governor of the State of Wisconsin as the protection and advocacy agency for people with disabilities under Sec. 51.62, Stats., 29 U.S.C. §794e, 42 U.S.C. §10801, *et seq.* and 42 U.S.C. §15041, *et seq.* Our work includes legal representation of individuals on disability related issues, training, publications, and policy efforts including legislative advocacy.

We work on behalf of individuals with a broad spectrum of disabilities including individuals with mental illness. Our work in this area has included discrimination issues and has ranged from direct representation in court proceedings to participation on the Governor's Blue Ribbon Commission on Mental Health.

ARGUMENT

I. PROTECTIONS FOR INDIVIDUALS "REGARDED AS" HAVING A DISABILITY ARE INTEGRAL TO LAWS INTENDED TO PROTECT PEOPLE WITH DISABILITIES FROM PREJUDICED ATTITUDES, IGNORANCE AND STIGMA.

> **Stigma 1.** a stain or reproach, as on one's reputation.
> **2. a.** a mark or obvious trait that is characteristic of a defect or disease: *the stigmata of leprosy....*

Random House Webster's College Dictionary, 1285 (1999).

Stigma or prejudice against persons who have received treatment for mental illness has long been recognized. *See* Fink and Tasman, *Stigma and Mental*

Illness (1992); *Addington v. Texas*, 441 U.S. 418 (1979), *Vitek v. Jones*, 445 U. S. 480 (1980). It is a major barrier to an individual's recovery from mental illness and reintegration into society.

According to the Surgeon General of the United States:

> stigma is "manifested by bias, distrust, stereotyping, fear, embarrassment, anger and/or avoidance. Stigma leads others to avoid living, socializing or working with, renting to, or employing people with mental disorders. . . . It reduces patients' access to resources and opportunities (e.g., housing, jobs) and leads to low self-esteem, isolation, and hopelessness. . . . In its most overt and egregious form stigma results in outright discrimination and abuse."

U. S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General* (1999) at 6.

In Wisconsin, stigma against persons with mental illness was identified as a major issue by the Governor's Blue Ribbon Commission on Mental Health.

> Stigma, defined by Webster's dictionary as "a mark of shame and discredit," affects almost everyone who experiences or has experienced a mental disorder. When trying to resume life in the community, most persons with a mental disorder say that other people in the community are unable to accept them. They have difficulty finding friends, housing, jobs, adequate education, dignity, respect, and equal opportunity.

Wisconsin Department of Health and Family Services, *The Blue Ribbon Commission on Mental Health Final Report* (1997) (hereinafter, *Blue Ribbon Report*) at 56.

In particular the Commission found that:

> People with mental disorders are discriminated against in many areas, including employment, housing, insurance coverage, getting a driver's license, etc. . . . Access to housing may be difficult if a landlord knows a person's mental health problem.

Blue Ribbon Report at 57.

Unfortunately, stigma has not been reduced by more effective treatments for mental illness, nor greater public awareness of the nature and causes of mental illness. In fact, stigma is as strong today as it was 50 years ago. *Mental Health: A Report of the Surgeon General* at 7. Thus, strong measures, such as enforcement of anti-discrimination laws, are critical for persons with mental illness to live successfully in our communities. This was echoed by the Governor's Blue Ribbon Commission:

> "Current laws prohibiting discrimination in housing and employment need to be enforced. . . ."

Blue Ribbon Report at 61.

A. 1992 Amendments to Wisconsin's Open Housing Law Should Be Construed in Harmony with Similar Civil Rights Legislation for People with Disabilities.

For three decades, the public policy in this country has prohibited imposition of stigma and actions in public arenas, such as employment, government programs, public accommodations and housing, based upon unjustified attitudes towards people with disabilities. In 1973, Congress passed the Rehabilitation Act, which included a prohibition of discrimination against "handicapped individuals" by federal programs. Publ. L. 93-112, Section

504, 29 U.S.C. §794. The Rehabilitation Act first used the broad, three-pronged definition of disability which includes not only those with substantial physical or mental impairments, but also those with a history of or regarded as having such impairments. Publ. L. 93-112, Sec. 6, 29 U.S.C. §705(20).

The Wisconsin Fair Employment Act was amended to include a similar, three-pronged definition by Ch. 334, L. 1981, Sec. 111.32(8), Stats. That Act "essentially codified the definitions employed by [the supreme] court in prior cases." *La Crosse Police and Fire Commission v. LIRC*, 139 Wis.2d 740, 756, 407 N.W.2d 510, 516 (1987) *citing American Motors Corp. v. LIRC*, 119 Wis.2d 706, 712, n. 4, 350 N.W.2d 120 (1984).

Congress acted again in 1988, borrowing the three-pronged definition in its amendment to the Fair Housing Act. Publ. L. 100-430, Sec. 5, 42 U.S.C. §3602(h). The version used in the Fair Housing Act is identical to the 1988 version of the Rehabilitation Act.

The public policy reflected in these laws was perhaps most clearly stated in the Americans with Disabilities Act of 1991, Publ. L. 101-336, 42 U.S.C. §12101, *et seq.*, which also uses the three-pronged definition of disability, 42 U.S.C. §12102(2). The Act states as follows.

> The Congress finds that:
>
> * * *
>
> (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful, unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic

> assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to society;
>
> * * *
>
> (9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity;

42 U.S.C. §12101.

Wisconsin amended its Open Housing Law in 1992. 1991 Act 295. Both the *Analysis by the Legislative Reference Bureau* printed with 1991 Assembly Bill 684 (which became 1991 Act 295) and *Wisconsin Legislative Council Report No. 14 to the 1991 Legislature: Legislation on Fair Housing and Community Living Arrangements*, informed legislators that "Assembly Bill 684 recodifies the State's Fair Housing Law [s.101.22, Stats.] based, for the most part, on the Federal Fair Housing Amendments Act of 1988". Wis. Legis. Council Rept. No. 14 at 3. The 1992 Wisconsin amendments, however, use the term "disability" as in the ADA, rather than "handicap" as in the Fair Housing Amendments Act of 1988. Because of this history, Sec. 106.50(1m)(g), Stats. should be read in harmony with these similar civil rights laws.

B. Wisconsin's Open Housing Law Is Intended to Be Interpreted Broadly to Protect People with Disabilities from Prejudiced Attitudes, Ignorance and Stigma.

While the 1992 amendment to the Wisconsin Open Housing Act has not often been construed, courts have

construed the similar language in the Wisconsin Fair Employment Act and federal legislation. The inclusion of "regarded as" language in civil rights laws was intended to protect individuals from "prejudiced attitudes or the ignorance of others." *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 284 (1986). Congress sought to eliminate the unjustified exclusion of people with disabilities from the mainstream of society due to fear, rather than the disability itself. *See id.* at 285 n.13; H.R.Rep. No. 101-485, at 53 (1990) *reprinted at* 1990 U.S.C.C.A.N. 267, 335. It is for this very reason that the Legislature used the "regarded as" language in the Open Housing Law definition of disability.

The Wisconsin Fair Employment Act prohibited discrimination based upon a perception of discrimination even before the Legislature amended it to provide specifically for that interpretation. *La Crosse Police and Fire Comm.*, 139 Wis.2d at 756-58, 407 N.W.2d at 516-17 *citing American Motors Corp.*, 119 Wis.2d at 712, n. 4. Surely reading the explicit language of the Open Housing Law similarly is an equally valid interpretation.

Moreover, cases interpreting the federal legislation make clear the reason for broadly interpreting the definition of disability in the fair housing context.

> The Fair Housing Act,... as amended, is a clear pronouncement of a rational commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculation about threats to safety are specifically rejected as grounds to justify exclusion.

Ryan v. Ramsey, 936 F. Supp. 417, 421 (1996). *See also*, *Vande Zande v. State of Wis. Dept. of Admin.* 44 F.3d 538, 541 (7th Cir. 1995) (Judge Posner explains that the "regarded as" language "actually makes a better fit with the elaborate preamble of the [ADA] ... [because m]any such impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence.").

The "regarded as" prong of the disability definition is thus perhaps more important than the other prongs. It serves to prohibit actions based upon unjustified fears, as here, where significant evidence that perceptions of disability and stereotypes related to that disability were factors in the landlord's actions.

II. THE EVIDENCE IN THIS CASE IS CLEARLY SUFFICIENT TO FORM A BASIS FOR THE DEPARTMENT'S DECISION.

In the instant case, Mr. Kitten was aware that Mr. Cenname was being treated for an eating disorder at Rogers Memorial Hospital. (R. 17:19, 113, 115, 180-181) Additionally, his sister, a nurse, had told him that depression was often associated with eating disorders and he was concerned about Cenname being suicidal. (R.17: 43, 132-33). He asked Cenname if he was suicidal and he posed a hypothetical in which he found Cenname in the garage with the car running. Cenname assured him that he was not suicidal. (R. 17: 43, 133). He then asked Cenname's mother if Cenname was suicidal and he again gave the example of the car running in the garage. She in turn assured him that Cenname was not suicidal. (R. 17: 142-50, 189, 205-07)

Both eating disorders and depression are listed in American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders DSM-IV* (1994). Because *DSM-IV* is recognized as providing the comprehensive source of diagnostic criteria in the psychiatric profession, both conditions are clearly impairments within the meaning of Sec. 106.50(1m)(g), Stats.

Donald Kitten perceived Spencer Cenname as a person with a mental illness[1] and then attributed certain qualities to him based on that perception. The Department's determination that Kitten imposed unusual and burdensome requirements on Cenname was more than justified by the record which shows that Kitten viewed Cenname as someone who had an impaired ability to eat and work,

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[1] The record includes the treating doctor's opinion, admitted by stipulation, that Mr. Cenname was being treated for "bulimia nervosa" and that the doctor believed that the disorder "disabled [Mr. Cenname] for major life activities". (R. 17: 57, 71, Ex. 4) Testimony indicated that he was admitted to the hospital for treatment of an eating disorder on May 11, 1998 and continued to receive in-patient treatment until approximately October 22, 1998, five months later, and out-patient treatment thereafter, that the disorder affected his sleep in addition to his eating and that he expected the condition to be life-long. (R. 17: 11, 19, 58-65, 72-74, 83, 113, 115, 180-81).

Upon this record, the Department could have found that Mr. Cenname suffered from a "mental impairment that substantially limits one or more major life activities." Sec. 106.50(1m)(g), Stats.; *See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. ___, Slip Op. at 13 (No. 00-1089, Jan. 8, 2002) (Those claiming protection must "prove a disability by offering evidence that the extent of the limitation [caused by their impairment] **in terms of their own experience** ... is substantial.) (emphasis added) *citing Albertson's Inc. v. Kirkingburg*, 527 U.S. 471, 567 (1999).

might commit suicide by enclosing himself in the garage with the car running, would likely be hospitalized again, and was unreliable in terms of paying his rent.

This is not a close case. The traits the record shows Mr. Kitten to have attributed to Mr. Cenname due to regarding him as having a mental illness clearly limit major life activities. There can be no question that Mr. Kitten regarded Mr. Cenname to have had a disability under any reasonable construction of Sec. 106.50, Stats.

CONCLUSION

In order to further the public policy goal of treatment and recovery for persons with mental illness and to achieve the integration into the community envisioned by Civil Rights legislation, including the Wisconsin Open Housing Act, housing discrimination against persons with mental illness must be eliminated. Stigma and prejudice unfortunately too often lead landlords to take actions that unfairly deny safe and affordable housing to people who are believed to have a mental illness. It takes no interpretation of the Wisconsin Open Housing Act to understand that the Legislature intended it to cover persons who are perceived as having a serious mental disorder. The Department, reviewing a record which provided ample support for its finding that the Plaintiff-Appellant regarded the Appellee as having a disability, so found. The court should use this opportunity to affirm the remedial purpose of the Open Housing Law as an important step in the fight to eliminate discrimination based on disability or the perception of disability.

Dated this 10th day of January, 2002.

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Certification

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